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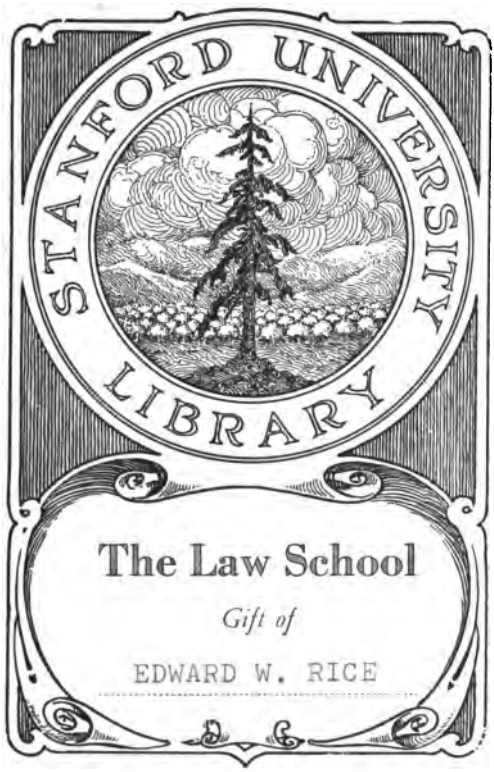
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LV
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A

TREATISE

ON

CONVEYANCING.

A

TREATISE

ON

CONVEYANCING:

WITH

A VIEW TO ITS APPLICATION TO PRACTICE:

BEING

A SERIES OF PRACTICAL OBSERVATIONS,

WRITTEN IN A PLAIN FAMILIAR STYLE,

WHICH HAVE FOR THEIR OBJECT TO ASSIST IN PREPARING

DRAFTS,

AND IN JUDGING OF THE OPERATION OF

DEEDS,

BY DISTINGUISHING BETWEEN

THE FORMAL AND ESSENTIAL PARTS OF THOSE DEEDS, &c.

IN GENERAL USE.

BEING

A COURSE OF LECTURES.

WITH AN APPENDIX OF SELECT AND APPROPRIATE

PRECEDENTS.

BY RICHARD PRESTON,

OF THE INNER TEMPLE, ESQ.

AUTHOR OF THE ELEMENTARY TREATISE ON THE QUANTITY OF ESTATES, &c. &c.

VOL. II.

LONDON:

Printed for W. CLARKE and SONS, Law-Booksellers,
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TO

LANCELOT SHADWELL, Esq.

LINCOLN'S-INN.

THE great experience you have had, and the eminence you have deservedly attained, in the conveyancing department of the profession, have made me anxious to place this volume of a work, so intimately connected with the subject of our pursuits, under your protection.

It was intended that the subjects which will be included in the third volume, should have possessed this advantage.

They had a better claim to this protection, from the circumstance of your having honoured them by a perusal, and kindly suggested some corrections; of which I readily availed myself.

But as the third volume cannot, with convenience, and consistently with other engagements, appear during the present year, I embrace the opportunity which the publication of this volume will afford me, of expressing the high sense I have always entertained, of the kindness and liberality I have uniformly experienced in my professional intercourse with you; and of my admiration of the sound and extensive practical information you possess: the necessary fruits of a long and laborious employment of eminent talents; in the study and application of the rules of property; and in the discharge of the arduous duties of your profession, equally to your honour, and the advantage and satisfaction of the profession at large, and the public.

And with great respect,

I am, dear Sir,

Your very faithful and obliged servant,

RICHARD PRESTON.

PREFACE

TO THE

SECOND VOLUME.

A LONG interval has elapsed since the publication of the former volume of this work.

The second volume has been delayed longer than was intended. This delay has arisen from various causes, personal to the author, and which, if fully detailed, would, he is satisfied, be received as an excuse, by those to whom he has to apologize. His anxiety for the success of this volume, and his still greater anxiety not to submit to the public any thing that had not been well considered, have principally caused the delay.

Not content with the manuscript as originally intended for publication, each chapter has been enlarged, and the new arrangement which became necessary, on that ac-

count, has caused infinitely more labour and anxiety than the original composition.

The chapters now offered to the profession treat of *declarations of uses, of fines, and recoveries*, also of *leases*; and there is added the first part of the chapter on that important subject, the assurance by *lease and release*. Something very extraordinary must happen to delay the publication of the remainder of this volume, beyond Michaelmas Term. It will complete the chapter on lease and release, and give a few selected precedents, with the indexes.

The importunity with which this volume has been demanded by the profession, has induced the author to publish it in parts, and he has more readily concurred in this arrangement, that the purchasers of the former volume, who think fit to have part of the second volume, may be gratified; and that the profession at large may be satisfied that the work is in a state of forwardness. To many also, it is more eligible to pursue a subject of this sort, by slow and gradual means, than to be burthened at once with a large book.

Whatever may be the opinion respecting the facility of discussing these three apparently simple subjects, of deeds leading and deeds declaring the uses of fines, leases, and

lease and release; the author can safely and truly assert, that these chapters have cost him more anxiety and actual labour, than the more abstruse subjects to be found in the former volume. For that volume he had an abundance of materials ready at hand: while for the present volume he has been under the necessity of searching very diligently for useful matter. And the chapter on lease and release has led to a more extensive investigation and research than he expected.

As might have been collected from the preface to the former volume, the chapter on deeds of uses has been written since the publication of the former volume. This alone would not have greatly retarded the completion of the second volume. The principal difficulty has arisen with the chapter on lease and release. That chapter has been so much altered and so much enlarged, that it has required ten times more labour in the revision, than it did in its original formation.

The more the author has considered the plan he has undertaken, the more he has been impressed with a sense of its importance; and, in justice to himself, and to the persons anxious to possess this volume, he could not feel satisfied to send the work before the public, without making it as valu-

able as it was in his power. The chapter on lease and release has, in a particular manner, and very deservedly, excited in the profession, a desire to possess the second volume. This has been a great inducement to treat of the subject more fully than was intended; that the profession may not be disappointed, at least as far as such disappointment could be prevented by the author.

Considering the lease and release, from its general use, as the principal assurance in modern practice; and for that reason most deserving of having its nature and parts thoroughly understood, the author has exerted himself most strenuously, to make the principles on which it depends, and its application in practice intelligible to the meanest capacity; and, while interesting the reader on this important subject, the author has endeavoured to elucidate the learning connected with this assurance, by those points which are incidently brought under the notice of gentlemen, who prepare or consider the effect of deeds of this kind. In particular, he has always availed himself of any fair opportunity, of inculcating the knowledge of the doctrine of uses, since, without understanding this branch of the law, no one can fully comprehend the ope-

ration or effect of one tenth part of the deeds which are prepared.

So much is to be found in approved books on the subject of ordinary leases, that to make the leading features, and great outlines, of this important and extensive head of the law, familiar to the student, and lay the foundation for his understanding the practical directions for preparing leases, and for avoiding those errors into which many fall, from a mistaken opinion, that any one can prepare a lease, has been the principal duty of the author. That no subject has afforded more discussion, or abounds with more nice distinctions, than the cases which have arisen between landlord and tenant, and between tenants and persons having an interest in impeaching their leases, are facts which are incontrovertible, and prove how mistaken is the notion which has been entertained on this point.

As far as the author can judge, this volume will be found more useful than the former. This opinion may be erroneous. It is formed, however, on the acknowledged utility of the subjects, and the fullest conviction that the pains bestowed on these three chapters exceed all reasonable belief. This labour, will, it is hoped, be ascribed to its proper motive; a wish to put into the hands of the student

a book, which, though by no means expected to be free from error, may, in its general principles, and its practical directions, contribute to assist the rising generation of the profession, and render the knowledge of conveyancing more simple, more general, and more correct. By confining the attention of the reader to useful points, and teaching that which deserves his first and most early attention, great progress is made, within a short time, in laying the foundation of more extensive knowledge, and for the correct application of that knowledge. The principal difficulty in studying the law, is to select the parts which are useful; and to distinguish out of the immense mass of contradictory decisions and opinions to be found in a lawyer's library, those points which are acknowledged to be sound law, from those which are over-ruled; or, from the qualifications added to them by subsequent decisions, stand in need of explanation. The students of the present day possess the incalculable advantage, of having their difficulties in this respect, materially relieved, and their labours abridged, by the present system of bringing before the public, treatises on particular subjects, in a connected series of observations; tracing the law to its principles; shewing the rules which govern the

subject; the cases which illustrate those rules; and the exceptions of which they admit; and the anomalies introduced by a departure from those rules and from those principles. By means of books of this sort, a student is enabled to become more familiar with the subject in a few months, than he otherwise could have done in as many years. For one, the present author feels infinitely indebted to the exertions of those gentlemen, who have so materially abridged the labours, and aided the researches of the student, and the practitioner; and laid the foundation for reducing the law into a system which leads to sound and solid information; at the same time, assisting and encouraging industry. Without the labours of a *Piggot*, a *Fearne*, a *Butler*, a *Cruise*, and a *Watkins*, how little would the important subjects of which these gentlemen have treated, have been understood, compared with the knowledge now possessed even by very young men on these intricate subjects: and it is only by pursuing legal subjects through these and the many other valuable treatises of modern date, that a student can expect to make himself master of any particular subject, within a reasonable period; or to keep his knowledge, when acquired, within the reach of his memory and applicable to practical purposes.

Truly happy will the author of this volume be, if his labours through a long professional life, directed to promote the same object, and assist in attaining these happy results; results in which society at large as well as the profession is interested; have been successful; and highly gratified will he be, if this volume shall, from its reception by the profession, afford him the satisfaction of reflecting that his sacrifices, to fulfil his engagements with the public, have not, in their estimation, been made in vain.

Inner Temple,
5th June, 1802.

ERRATA ET CORRIGENDA.

Line.	Page.	
12	29	Usunum obliterate the *n*.
21	94	*For* conveyance *read* covenant.
15	225	*For* demure *read* demise.

A

PRACTICAL TREATISE

ON

CONVEYANCING.

CHAP. I.

OF DEEDS TO LEAD, AND DEEDS TO DECLARE, THE USE OF FINES.

THE books abound with various distinctions, concerning the declaration of the uses of fines, recoveries, and other assurances. Some of these distinctions relate more immediately to *agreements* for fines to be levied, recoveries to be suffered, and the like; while others relate to deeds, declaring the uses of fines already levied, recoveries already suffered, or conveyances already made. Cases of the former description relate to that species of assurance, which is usually denominated *a deed to lead the uses of a fine*, &c.; and cases of the latter description relate to those deeds which are generally, and properly, styled *deeds to declare the uses of fines*, &c. There is a third species of assurance, partaking partly of the nature

of a deed to *lead*, and partly of the nature of a deed to *declare*, the uses of a fine, &c. as a *conveyance* made to the intent that a common recovery shall be suffered to uses; and it is to be lamented, that many treatises, valuable for the information they afford, have not adverted to this species of assurance, as governed by other rules than deeds *to lead* the uses of fines, &c. Without understanding the precise nature of these several assurances, the rules of law by which they are governed, and the distinctions to which they give rise; it will not be easy to comprehend the books that treat of these subjects. No use can arise in any deed operating at the common law, unless an estate of *freehold* is transferred, to supply a seisin to these uses. A fine or recovery must operate as a conveyance of an estate of freehold, as a preliminary step to a declaration of uses. As far as it is merely a release of *right*, or confirmation of *title*, no uses can be declared with effect, because no *seisin* passes; and as often as the fine operates on the equitable right, the uses which are declared will only govern the equitable title, by varying or modifying that title. These uses will not have any influence on the legal estate, except so far as they charge that estate by way of *trust*. A deed to lead the uses of a fine or recovery, is not a conveyance of itself: it has no individual, or immediate operation on the seisin, or estate: it is merely a

covenant or agreement to levy a fine, or suffer a common recovery; with a declaration, that the fine when levied, or recovery when suffered, shall enure to certain uses. This deed, and the fine when levied, or recovery when suffered, will operate as part of the same assurance (*a*). No estate passes till the fine is levied or recovery suffered; and in the mean time, no uses can arise for want of a seisin to supply or feed these uses.

2dly. A declaration of uses supposes, as the fact really is, the fine to be levied, or recovery to be suffered. Of course, the seisin has passed to the conusee in the fine, or the demandant in the recovery; and the uses remain in a dormant and inefficient state, for want of a direction giving them a definitive object. Till by the declaration, the uses are called into operation, they will result to the former owner, or respective owners, according to the former ownership of the person, or those several persons, in such manner as has been noticed in the former volume (*b*). A long interval, even of many years (*c*), may

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(*a*) Stapilton and Stapilton, 1 Atk. 5.; and see 2 Lev. 54. 2 Burr. 1184.
Ferrers and Curson *v.* Fermor and others, Cro.Jac.643.
Fountain *v.* Cook, 1 Mod. 107. 1 Vent. 195.
Herring *v.* Brown, Ventris, 368, 371.
Doe ex dem. Odiarne *v.* Whitehead, 2 Burr. 704.
(*b*) Page.
(*c*) Altham *v.* Anglesey, Gilb. Eq. Cases, 16.

elapse before this declaration is executed. From the moment the declaration is executed, the seisin will be bound with the uses, and these uses will arise from the seisin, transferred to the conusee in the fine, or demandant in the recovery; and not from that seisin which the former owner takes by way of *resulting use*. The seisin under that use cannot be transferred without a formal conveyance adapted to the circumstances of the estate of the party; while the seisin, transferred to the conusee in the fine, or the demandant in the recovery, may be affected and bound merely by a declaration of uses to arise out of that seisin.

3dly. In this species of assurance, a seisin or estate passes by the operation of the conveyance; the estate itself is transferred. Sometimes uses are declared, so as to arise immediately, as in *Stapilton* and *Stapilton* (*d*). In other instances, the conveyance is merely to the intent that a fine shall be levied, or a common recovery shall be suffered, and uses are directed to arise, out of the seisin of the conusee in the fine, or the demandant in the recovery. Although the conveyance is made, and the fine is to be levied, to one and the same person; and although the fine and the conveyance, or the conveyance and the re-

(*d*) 1 Atk. 2.

covery, form part of the same assurance, the uses are to arise only from the time that the fine is levied or the recovery is suffered (*e*). In the language of Lord *Mansfield*, applied to a case of this description, the deeds must be considered as *executory*, till the fine is levied, and then the estate passes by the fine (*f*). It must be remembered, however, that the person who has already conveyed his estate, no longer retains any legal ownership. That ownership has passed by his conveyance; and he is effectually bound by the conveyance, as far as it is operative; and merely retains, in consequence of his former ownership, the power of giving a more complete effect to his conveyance, by rendering that assurance absolute, which was defeasible, or by rendering that ownership indefinite, which was at first determinable (*g*). Lord *Mansfield's* doctrine, that the deeds must be considered as executory, is to be read with reference to the rule, that for some purposes, the fine, recovery, and deed, are parts of the same assurance; they never were intended to deny, that the seisin passes by the conveyance. These preliminary observa-

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(*e*) 2 Burr. 714.
(*f*) In Doe ex dem. Odiarne *v.* Whitehead, 2 Burr. 714.
(*g*) Stapilton *v.* Stapilton, 1 Atk.
Goodright *v.* Mead, 3 Burr. 1703.
Cheney *v.* Hall, Ambl. 526.
Moody *v.* Moody, Ib. 649.

tions lead to the consideration of the rules which govern,

1st, Deeds to *lead* the uses of fines, &c.

2dly, Deeds to *declare* the uses of fines, &c.

3dly, Deeds of *conveyance* to uses, to be perfected by subsequent fines, &c.

Whether the agreement, or declaration, relates to a fine, or a common recovery, it is governed by the same rules. For that reason, cases applicable to either species of this assurance will be introduced, as equally relevant to the point requiring elucidation; or, at least, as often as any distinction arises, peculiarly applicable to either species of this assurance, that distinction will be noticed by way of caution against any error into which the reader might otherwise be led.

As to Deeds to lead the Uses of Fines.

The general rules which govern deeds of this description, are to be found in the Countess of *Rutland*'s case (*a*). These resolutions are in the following terms:

First, "Although the indentures being made "for declaring the uses of a subsequent fine, "recovery, or other assurance, to certain per- "sons, and within a certain time, and to certain "uses, are *but directory*, and do not bind the "estate or interest of the land; yet if the fine, "recovery, or other assurance, be pursued ac- "cording to the indentures, there could not be "any bare averment against the indentures "taken in such case, that after the making of "the indentures, and before the assurance, by "mutual agreement of the parties it was con- "cluded and agreed, that the assurance should "be to other uses: but if other agreement, or "limitation of uses, be made by writing, or by "other matter as high or higher; then the last "agreement shall stand: for every contract "or agreement ought to be dissolved by matter "of as high a nature as the first deed; *nihil*

(*a*) 5 Co. 258.

" *tam conveniens est naturali æquitati, unum-*
" *quodque dissolvi eo ligamine quo ligatum est.*
" Also, it would be inconvenient that matters
" in writing made by advice and on considera-
" tion, and which finally import the certain
" truth of the agreement of the parties, should
" be controlled by averment of the parties, to
" be proved by the uncertain testimony of
" slippery memory; and it would be dan-
" gerous to purchasers and farmers, and all
" others in such cases, if such nude averments,
" against matter in writing, should be ad-
" mitted.

Secondly, " If the form of the indentures
" be not pursued; as for the quantity of
" the land, or the time within which, &c. in
" these cases, and other like, where the in-
" dentures be not pursued, averment, without
" writing, might be taken, that the fine, reco-
" very, or other assurance, was to another use
" or intent than is contained in the indenture;
" for inasmuch as the indentures are not pur-
" sued, it is reasonable that the parties should
" be admitted to shew the cause and reason
" why they were not pursued, by reason of
" the new agreement subsequent, which in
" such case might be as well by word, as by
" writing.

Thirdly, " Although the indentures are not
" pursuant in circumstance of time, quan-
" tity, person, and the like; yet if no other

" new mean agreement can be proved, the " assurance should be, in judgment of law, " to the use contained in the indentures.

Fourthly, " In the principal case, the fines " could not be directed by both the indentures; " that is to say, by the first indenture, to the use " of the Earl Edward and Isabel his wife, 'for " their lives;' and by the second indenture, " to the Earl and the heirs males of his body, " with the remainders over, limited by the " second indenture; and so the fines to work " upon both the indentures (although perad- " venture such was the intent of the parties); " and that for three reasons:

1st, " The directions and declarations of " the first indentures were controlled and frus- " trated by the second indentures, and there- " fore the fines could not be directed by both.

2dly, " The indentures import several dis- " tinct, and divers contracts and estates; that " is to say, one to the Earl and Isabel his wife, " and to the heirs of the Earl; the other, to the " Earl only, and to his heirs males of his body, " with divers remainders over: so that the " fines ought for the manor of Eykering to be " directed, either wholly by the first, or wholly " by the second, without any fraction or divi- " sion of estates.

3dly, " It would be against the words and " intent of both the indentures, to make a " hotch-pot and commixture of both, which,

" by their creation, were several and distinct in " time, in persons, and estates."

The best course will be, to consider the several resolutions, and to examine how far the points in these resolutions are understood to be law at this day; and how far they are altered by statutable regulations, or by subsequent decisions.

In this case, Edward, Earl of Rutland, who was seised in fee of the manor of Eykering, by indenture bearing date the 10th March, 21 Eliz. covenanted with Sir Gilbert Gerrard and Thomas Holcroft, that he (the Earl) would, before the end of Trinity term then next following, assure, by fine or other assurance, the said manor to the said Sir Gilbert and Thomas, in fee; with a declaration, that this fine should be to the use of the Earl and Isabel his Countess, and to the heirs of the Earl. On the 29th day of the same month, by another indenture, between the Earl, of the one part; and Lord Burghley, Sir Gilbert Gerrard, and others, of the other part; the Earl covenanted with the parties of the 2d part, to convey the said manor of Eykering, amongst others, to the parties of the 2d part, or to some or one of them, before the feast of the Annunciation of our Lady next following; with a direction, that such assurance should be to the use of the said Earl, and the heirs male of his body; and for default of such issue, to the use of the heirs

male of the body of Thomas, Earl of Rutland, with divers remainders over. No fine, or other assurance, was levied or made by Earl Edward before the end of Trinity term. Afterwards, viz. on the 17th September next following, Earl Edward acknowledged a note of a fine of the manor of Eykering only, to Sir Gilbert and Thomas, and the heirs of Sir Gilbert. On the 18th of the same month, he acknowledged another note of a fine of the said manor of Eykering, amongst many other manors mentioned in the last indenture, to the parties of the 2d part in that indenture, and the heirs of Lord Burghley, one of those parties. And both fines were entered *in octabis Michaelmis* then next following. It was proved by witnesses, that Earl Edward, as well before the indentures, as after the fine levied, told them, that the Countess should have the manor of Eykering for her jointure.

This statement of the facts of the case will shew the application of the several resolutions:

1. The first resolution admits that the indentures were only *directory*, and did not bind the estate or interest of the land. All the cases agree on this point. In particular, in *Stapilton* v. *Stapilton* (*b*), already cited, Lord *Hardwicke* noticed, that it had been argued by the counsel, that if the 1st decla-

(*b*) 1 Atk. 8, 9.

ration of the uses is in general to prevail, purchasers of estates, though they have a recovery for strengthening their title, with a declaration of the uses of the recovery to themselves and their heirs, cannot be safe; for the vendor may defeat such declaration, by a precedent one to different uses. But his Lordship observed: "In such cases, I think, "a recovery will not enure to make good "such former declaration of uses, but only "the uses of the purchase." From the context it is evident, that his Lordship's observation is to be confined to those instances in which the former declaration was merely executory, depending only on agreement, without any conveyance to secure the effect of that agreement. In a subsequent part of the case, his Lordship observed; "This case is different "from those that turn only upon the point of "the effect of a mere declaration of uses; "for a mere declaration of uses subsists only "upon the agreement of the parties, and in "such cases, where the agreement has been "changed by mutual assent of all parties, "there a recovery shall enure, to make good "such last agreement or declaration."

But his Lordship proceeded to observe: "If "the estate was vested, notwithstanding such "declaration of uses, yet the recovery has al-"ways been held to make good such de-"feasible estate: for the prior lease, charge, "or estate, made by tenant in tail, is only

" defeasible by the issue, by virtue of the " statute *de donis* (*c*), which was made to pro- " tect the issue against the alienation of the " tenant in tail; therefore the issue could " avoid such lease, &c. but not the tenant in " tail himself. But when by the recovery he " has gained to himself a fee, all the reasoning " for avoiding the estate made by tenant in " tail is gone, for the issue is barred by the " recovery."

2. The next point of this resolution assumes, that when the circumstances of levying the fine, prescribed by the agreement of the parties, are observed, so that the fine is between the same persons, of the same parcels, and within the appointed time, no averment (that is, parol evidence) can be admitted to shew that the fine was levied to other uses than those contained in the indentures. This branch of the resolution depends upon rules of evidence. As that which was stipulated by the indentures to be done, has been done, the law will not allow parol evidence to control the agreement, so as to admit that that which is certain, and depends on the solemn act of the parties, may be varied by evidence of less solemnity. It follows, that evidence merely by writing, as well as *parol evidence*, will be insufficient to vary the uses declared by *a deed*, when the circumstances prescribed

(*c*) 13 Edw. 1. c. 1.

by that deed are observed. In *Jones* v. *Morley*(*d*), Lord Chief Justice *Holt* also states the law to be: "That if the fine had been levied "*pursuant to the covenant*, no parol averment "could have been allowed to declare the "uses, or that the fine was not to the uses of "that deed; and all parties had been estop- "ped to aver the contrary by parol: but by "deed subsequent and *before the fine*, other "uses may be averred."—In these observations note that the second declaration must be *before* the fine is levied; and that the agreement of all necessary parties to the variation of the uses, is to be understood.

3. The third branch of the resolution is, that the uses contained in a former instrument, either in writing, or attended with the solemnities of a deed, may be varied by another instrument, as solemn as, or more solemn than the former instrument. This is also admitted by the observations of Lord C. J. *Holt*, taken from *Jones* v. *Morley*. Thus, uses in a deed may be varied by another agreement contained in a deed; and uses contained in a mere writing, may be varied by another instrument, merely in writing, or attended with the still greater solemnities of a deed.

4. This resolution supposes the fine to be between the same parties; for when there is a change in the parties, one of those cir-

(*d*) 1 Salk. 677.

cumstances, which excludes the admission of other evidence, is wanting; and no part of this resolution denies the right of the owner of the estate, to levy a fine to other parties, and to declare uses, which shall prevail against a declaration between the parties to a former instrument. By some means not easily to be accounted for, it has been understood, that no variation in the uses can be made without the concurrence *of all persons concerned* in interest. That qualification is correct, as applied to conveyances containing agreements under which uses are to arise; since the parties acquire an inchoate interest under that conveyance: but its accuracy is questionable, when it is applied to instruments merely directory; as deeds to lead the uses of fines, &c. The qualification is sanctioned, however, by the authority of Lord *Hardwicke*. In *Stapilton* v. *Stapilton* (*e*), he noticed, that it was said at the bar, that the declaration of the uses was in the power of the tenant in tail, and that he might declare new uses; and he observed, "I take that not "to be law, for such subsequent declaration "must be by all the parties concerned in "interest." Without the context, it might have been supposed that his Lordship's observation was confined to the case before the court; namely, the case of a conveyance. But

(*e*) 1 Atk. 7.

it is impossible not to collect, that his Lordship had the case of the Countess of Rutland in his contemplation, as warranting this opinion; for he proceeds to observe (*f*), that "in the case of the Countess of *Rutland*, it is "not laid down, that the tenant in tail might "declare new uses; but said, while it is direc-"tory only, new uses may be declared: and "the meaning of that is, that as the uses "must arise out of the agreement of the "parties, the parties may change the uses; "but that must be done by the mutual con-"sent of all *the parties concerned in interest*; "and in that case, it was a mutual agreement "of all parties." The accuracy of this part of the report may be justly questioned. In the first place, the observation is not correct in supposing that, in the Countess of *Rutland*'s case, there was a mutual agreement of all parties; or that there was the concurrence of all persons concerned in interest. The Countess was concerned in interest, and yet she did not assent to the second declaration. Nor will the case be relieved from its difficulty, by the answer that she was not a party to the first indenture. Holcroft, one of the intended conusees, was a party to that indenture; and it does not appear that he joined in the second declaration. Nor indeed did the Court enter into any other dis-

(*f*) 1 Atk. 7.

quisition of the facts, than that as the first indenture was not pursued in its circumstances, the second indenture might govern the declaration of the uses of the fine. A still stronger ground for questioning the accuracy of this part of the report, is, that it is not consistent with the subsequent part of the same report; in which his Lordship declared his opinion to be (*g*), that "the recovery of tenant in tail will not enure, to make good such former declaration of uses, but only the uses of the purchase." And in *Jones* v. *Morley*, afterwards cited, one of the persons interested under the first agreement, did not concur in the second agreement, and yet the second agreement prevailed. When the fine is levied pursuant to the first agreement, and to the persons who, by that agreement, are to be conusees in the fine, it is consistent with principle, and with the nature of uses, that the uses shall be governed by the first agreement. Before the statute of uses, the conusee would have retained the seisin or estate. The question in equity would have been, for whom he was a trustee; in short, who was to have that which at this day is termed the use. It is reasonable that no agreement behind his back, should make him a trustee for persons who were strangers to the agreement. He, and those whose interest he supported, might

(*g*) 1 Atk. 9.

contend that he was subject to no other uses than those declared by the agreement with him; and the evidence would prove that he received the estate to those uses which were contained in that agreement. This seems to have been the origin of the rule, requiring the concurrence of all persons concerned in interest; and in practice the case ought not to be carried further than the principle from which it originated. Independent of this principle, it is difficult to understand the law on this point: for, suppose A. seised in tail, or in fee, to covenant with B. to levy a fine as of next Michaelmas term, to various uses in strict settlement, under which he is to be tenant for life, with remainder to persons not in being; and afterwards A. declares that the fine, when levied, shall enure to other uses; what principle is there to prevent the second declaration of uses from governing the title? Is not the fine levied to the second uses, and not to the first uses; and is it not optional in A. whether he will be guilty of a breach of his covenant, or not? And is the first declaration more than a covenant or agreement, leaving in A. the full ownership and power of disposition of the property to such uses as he shall think fit? And if he may vary the uses by a new conveyance, why is the power of doing it by a new declaration to be denied to him? It is difficult to comprehend the force of any objection that can be urged

against the validity of the second declaration, except such reasons as arise out of the learning of uses in their fiduciary state.

It is only while the agreement is directory, that the uses can be varied. The moment the fine is levied, pursuant to an agreement, the estate is bound with the uses, and they are executed into estate; and to alter or vary the state of the title, there must be a *new conveyance*, under the seisin or estate, arising from the uses; or an appointment in exercise of some power conferred by those uses. An attempt to vary the uses by a new agreement, so as to regulate the operation of the fine, will come too late.

Vavisor's case (*h*) is supposed to warrant a different conclusion; namely, that a deed, executed after the suffering a recovery, may be controlled by a subsequent deed. That point certainly was decided in *Vavisor's* case; but this case is not to be understood as an authority governing declarations of uses at this day. It had the peculiar circumstances of deciding the right, under uses declared before the statute of 27 H. 8; and all that was determined by that case, is, that though the uses were declared upon the recovery, in favor of the husband and wife and their heirs, and a conveyance had been made to them and their heirs, these uses were changed,

(*h*) Dyer, 307.

by a subsequent agreement between the husband and wife, so as to bind the estate of the husband, who survived his wife, with an use in favor of the heirs of the wife. In fact the statute found the use, by virtue of the husband's agreement, in the heirs of the wife, and executed that use. This authority cannot then be applied to support the position, that an use once executed by means of a declaration, can be changed by a new agreement, without a conveyance, notwithstanding such agreement is with the consent of all persons concerned in interest.

The second resolution.—This resolution has been adopted from time to time, and is considered as law at the present day. In *Stapilton* v. *Stapilton*(*i*), the language of Lord *Hardwicke* is, "Before the Statute of Frauds, if the deeds "declaring the uses, had not been pursued, "a parol declaration of uses would have been "let in; but if there is a deed declaring the "uses, and the common recovery is suffered "accordingly, that would, before the statute, "exclude a parol declaration of new uses." So in *Jones* v. *Morley* (*j*), the third resolution of the Court was, that "since the fine is "not according to the deed, other uses may "be averred, though they were declared by "writing, and not by deed; for by that vari-

(*i*) 1 Atk. 7.
(*j*) 2 Salk. 677.

" ance, there is room or occasion given to " inquire, and receive information, that the " old agreement was relinquished; and by " the same reason, the use of a fine may be " declared by parol, upon an original agree- " ment; it may now, as in this case, where " the original agreement was relinquished." The case of *Jones* v. *Morley* is more remarkable for the circumstance, that the decision turned on a clerical error. A settlement was made by lease and release, and a use declared, till a jointure should be settled on the wife. In Hilary term 1665, by a deed, dated in that term, the husband and wife covenanted to levy a fine in next Hilary term, evidently meaning the then present Hilary term, and the use was declared to the husband in fee. Two days after the former indenture, by a writing not attended with the solemnities of a deed, the husband and wife declared, that the uses of the former deed should be revoked, and the fine was levied as of the then present Hilary term; and the writing, and not the deed, governed the uses. *One* alteration has been made in this resolution, by the Statute of Frauds and Perjuries, 29th Car. 2. In consequence of that statute, the uses of a fine cannot be declared merely by parol. There must be a writing. The statute enacts, sect. 6. " that from and after the 24th day " of June, all declarations or creations of " trust or confidence, of any lands, tenements,

" or hereditaments, shall be manifested and " proved by some writing, signed by the " party who is by law enabled to declare " such trusts, or by his last will in writing, or " else they shall be utterly void and of none " effect." With a proviso, that " where any " conveyance shall be made, of any lands or " tenements, by which a trust or confidence " shall or may arise, or result by the impli- " cation or construction of law, or be trans- " ferred or extinguished by act or operation " of law, then and in every such case such " trust or confidence shall be of the like " force and effect as if this statute had not " been made." And the statute of 4th Anne c. 16. for "the amendment of the law, and the " better advancement of justice," after reciting that " it had been doubted, whether, since " the making of the said last-mentioned act of " parliament, the declarations or creations of " uses, trusts, or confidences, of any fines or " common recoveries, manifested by deed " made after the levying or suffering such " fines or recoveries, are good and effectual " in law;" enacted " that all declarations, or " creations, trusts, or confidences, of any fines " or common recoveries of any lands, tenements " or hereditaments, manifested and proved, " or which shall hereafter be manifested and " proved, by any deed already made, or here- " after to be made, by the party who is by " law enabled to declare such uses or trusts,

"after the levying or suffering of any such "fines or recoveries, are and shall be as good "and effectual in the law as if the said last-"mentioned act had not been made."

The third resolution also remains in force, not only unimpeached by any subsequent decision, but enforced by resolutions in other cases. Thus in the cited case of *Stapilton* v. *Stapilton (k)*, Lord *Hardwicke* observes, "it "is true, where there is an agreement to suf-"fer a recovery, and uses are declared; if "the recovery is after suffered, though it va-"ries in point of time from the recovery cove-"nanted to be suffered, yet if there is no subse-"quent declaration of uses, the recovery will "enure to the uses so declared." And in the third resolution, in the case of *Jones* v. *Morley*, already cited, Lord *Holt* observed, "that with-"out such averment, the fine shall be intended "to the use of the first agreement, notwithstand-"ing the variance." In the report of the same case by Lord *Raymond (l)*, the proposition is stated more distinctly in these terms: "though there is a variance between the "deed and the fine, yet, if nothing appears "to the contrary, the fine shall be taken to "be to the uses of the deed: and in that "case the deed is not only evidence of the "uses, but the fine is, by construction of law, "to the uses of the deed."

(k) 1 Atk. p. 7.
(l) 1 Lord Raym. 289.

The fourth resolution proceeds upon the same principle, as is to be found in *Beckwith's* case, cited in the first volume (*m*). This doctrine was discussed in *Taylor* v. *Horde* (*n*), and a different doctrine seems to have prevailed in that case. According to the decision of that case, several deeds may be construed as part of the same assurance; and the uses in each deed may have effect, as far as they are consistent. The language of Lord *Mansfield* in that case was; "as to the first "ground, that Lady Atkyns had no estate for "life, the whole argument depends upon "this proposition, that the lesser deed was "executed after the greater deed; and consequently the power to sir Robert Atkyns "the father, to make a jointure, was extinguished by the fine levied in Trinity term "1669. But the jury have not found the "fact, which was first executed. Both deeds "bear the same dates. They are both consistent. They are both manifestly but one "agreement, executed by different instruments, to answer different purposes, and "to suit (probably) the convenience of one "party, who was interested only in a small "part of the transaction. The fine levied in "Trinity term 1669, pursued both deeds, and

(*m*) p. 314.
(*n*) 1 Burr. p. 60.

" comprises all the premises in the greater " deed by which the powers were created.

" It never could be the intent to revoke " those powers at the instant they were " created, by the lesser deed, which makes no " mention of them; or by a fine levied agree- " able to the greater deed, in which they are " contained.

" Sir Robert Atkyns, who survived the " transaction above 30 years, has shewn, by " many acts, that he understood the powers " to be well created and subsisting.

" If it was necessary, we ought to presume " the lesser deed first executed, to support the " clear intent of parties, in a family settle- " ment, made for valuable consideration; for " it is impossible to suppose they could really " mean to revoke or extinguish these powers, " and take this way of doing it. But in this " case, there is no room for presumption: the " internal evidence of the thing itself speaks " them to be one transaction; and the same, " to all intents and purposes, as if expressed " in one instrument."

Of Deeds declaring the Uses of Fines.

In deeds of this description, there is an interval between the time when the fine is levied, and the date of the declaration of the uses. The presumption of law is, that the use results to the former owners, immediately after the fine is levied; and it is an acknowledged rule, that when there is no declaration of uses, or as far as the declaration of uses does not extend, or is ineffectual, the use will result to the former owners, according to their respective interests at the time when the fine was levied; but the law allows of a declaration of uses, at any time in the life of those parties by whom the fine is levied. The law on this point was fully considered in *Dowman's* case (*a*). In that case, a recovery was suffered in pursuance of an agreement, and no uses were declared by that agreement. After the recovery had been suffered, and by a deed reciting the recovery, uses were declared; and this deed, and the uses, were found by special verdict; and one of the questions moved and argued in the case, was, if the

(*a*) 9 Co. 7. b.

said indenture, *made* after the said recovery, was sufficient in law to direct and declare the uses of the said precedent recovery. And it was argued, " that the said indenture was " not sufficient to declare and direct the " uses of the said precedent recovery, for five " reasons and causes:—1st, When a recovery " is suffered (it being without consideration), " immediately after the recovery the law " adjudges it to be to the use of him who " suffers the recovery, and his heirs; then, " when the use, in the case at bar, was vested " in Peter Vavisor immediately after the " recovery executed before the said inden- " tures made, this use so vested cannot be " divested by any declaration or agreement " subsequent; and the deed indented shall " not conclude the heir in this case, because " it being subsequent, cannot by the law " divest that which was vested immediately " after the recovery had. And to this pur- " pose they cited the books in 39 Ass. p. 3. " & 46. E. 3. Assise 357. where an infant " brought an assize against T. of certain lands; " the defendant said that J. uncle of the in- " fant, whose heir he is, held the said land " of him by homage, escuage, and four marks " rent, and died seised; and because the plain- " tiff was within age, he seized the tenements " by reason of wardship: to which the plain- " tiff said, that the said J., held in socage " &c.; to which T. the defendant said, to say

" that you shall not be admitted, for the said " J. your uncle, upon a debate betwixt us, " acknowledged to hold the same land of us " by such services, by deed indented; and " demanded judgment, if he shall be received " to say the contrary, and shewed the deed, &c. " and that case for difficulty was adjourned " into this court, and there it was adjudg- " ed that the said acknowledgment or de- " claration by deed indented, should not " conclude the heir of J.; and the reason " of *Thorp* Chief Justice, who gave the judg- " ment, was, because by the deed indented, " other services could not be granted which " were not due before, wherefore take the as- " sise. So in this case at bar, the deed in- " dented subsequent shall not conclude the " heir of Peter Vavisor, because it cannot " divest the use, which was, by operation of " law, vested immediately after the recovery. " And they also cited 35 H. 6. 33, b. *John* " *Crook's* case, where the like acknowledgment " by deed indented was made, &c. and estop- " pel pleaded; and it was adjudged that the " declaration, by deed indented, for the cer- " tainty of the services, should not bind " the heir of the tenant, who was party " to the said deed indented.—2dly, it was " objected, that every declaration of uses " upon recoveries, fines, &c. of lands, tene- " ments, and hereditaments, ought to be cer- " tain, otherwise there will be no certainty of

" inheritance; and this certainty ought to " be chiefly in three things, &c. in persons " to whom; in lands, &c. of which; and in " estates by which uses shall be limited and " declared; and if certainty fails in any of " them, the declaration is not sufficient. But " here in the case at the bar, there was not " any of these certainties when the recovery " was suffered; and therefore the declara- " tion subsequent insufficient, *oportet quod* " *certæ personæ, certæ terræ, &c. &c. certi sta-* " *tus comprehendantur in declaratione usuum.* " The 3d objection was, that the limitation " and declaration of the uses ought to be com- " plete of itself, without any reference to in- " dentures or other writings to be made " afterwards; for then it is but an imperfect " communication, and no complete declara- " tion; and that it was but a communication, " they alledged three reasons:—1, that the " uses were many, and of great variety of es- " tates: 2, that it concerned the establish- " ment of his inheritance of a great yearly " value in his name and family, and therefore " the intention of the parties never was to " leave it to the sliding and slippery memory " of man, which would be lost in a short " time, and especially when the said Eliza- " beth (one of the plaintiffs) was his sister and " heir, before whom he preferred others of his " name and blood: 3, several of the uses and " estates could not be limited with such

" qualities and privileges by word without " deed, as the use limited to the said Peter " Vavisor (and to divers others for life), with- " out impeachment of waste, which privilege " to be dispunishable of waste none can have " by word without deed; and therefore " all the words which passed betwixt the " parties before, or at the time of the recove- " ry, were referred to indentures to be made " thereof, and so but a communication, and " no complete agreement, *quia id perfectum* " *est quod ex omnibus suis partibus constat, et nihil* " *perfectum est dum aliquid restat agendum.* " The 4th objection was, that the said inden- " ture was but directory, and declaratory of " the uses of the recovery, and was not of " any force to raise or create any use: then " when the issue is, whether the said recovery " was suffered to the said uses mentioned in " the bar, the said indenture subsequent " might, peradventure, be good evidence to " persuade the recognitors of the assise that " the said recovery was suffered to the said " uses; but of itself, being subsequent to the " recovery, it is not sufficient in law to direct " the uses of the precedent recovery, unless " by the agreement of the parties the uses " were so declared before, or at the time of " the recovery; and then the declaration pre- " cedent, and not that which was subsequent, " is the declaration which binds in law, and " the subsequent is but evidence to prove

" the precedent: and therefore, if the said Ed-
" ward Vavisor had pleaded the said reco-
" very, and pleaded also the indenture sub-
" sequent, to the effect as the recognitors
" have found it, that would be altogether in-
" sufficient, for the indenture subsequent
" is but the report and evidence of a former
" thing, &c. 'that the true meaning of all
" the said parties, &c. at the time of the
" said recovery, &c. was, that the said recove-
" rors, &c.'; and evidence shall never be plead-
" ed, because it tends to prove matter in fact,
" and therefore the matter in fact shall be
" pleaded; and if that is denied, the evidence
" is to be given to the jury, and not to the
" court. And therefore, in 9 E. 3. 5, b.
" and 6, a, John Darcy brought a quare
" impedit against the Bishop of Durham,
" of a disturbance to present to the
" church of Simondsbury, and declared that
" King Edward 2, was seised of the manor of
" Wreckes in Tindall, to which the advowson
" is appendant, and presented, &c. and made
" the descent of the manor to the king that
" now is, who gave the manor, with the fees
" and advowsons, to the plaintiff, and his heirs,
" &c.; to which the defendant said, that the
" advowson is not appendant to the manor,
" &c.; to which the plaintiff replied, that, to
" this averment the defendant should not
" come; for we say, that one Edward, late
" king of Scotland, was seised of the manor
" of Wreckes, and of the advowson, and pre-

" sented to the church as appendant; and " shewed how afterwards the manor came " to the hands of king Edward, the grand- " father, by forfeiture of John Baliol; and " shewed how afterwards the kings presented " as appendant to the manor; wherefore the " plaintiff did not conceive that against so " many presentments as appendant, that the " defendant should be received to say that the " advowson is not appendant. And Sir " *William Herle*, who gave the rule, said, the " presentments of which you speak are but evi- " dence to the jury that the advowson is ap- " pendant, and evidence shall not oust the " defendant of his plea. The 5th and last " objection was, that if these declarations sub- " sequent should be sufficient in law to de- " clare the uses of a precedent recovery, for " as much as they will be restrained to no " certain time, and therefore may be made " many years after, by that means estates, " leases, and interests in and out of the lands " *vested in the mean time*, would be thereby " defeated, which would be full of mischief " and inconvenience. And the case of *Ar-* " *thur Basset*, which you may see reported by " the Lord Dyer, 3 & 4 Ph. and Ma. 136, that " indentures made four years after a recovery " were held sufficient to declare the uses of a " precedent recovery, was agreed to be good " law; for in the said case of *Basset* the recovery " was suffered in 16 H. 7, and the indentures " made anno 20 H. 7, (which was long before

" the statute of transferring of uses into pos-
" session) at which time an use, being but a
" thing in confidence, might be directed and
" altered according to the intention of the
" parties. And after the case had been often
" argued by the serjeants at the bar, the case
" was argued by the justices at the bench;
" and it was unanimously resolved by all the
" justices of the bench, that the said indenture
" subsequent was sufficient to direct and de-
" clare the uses of the precedent recovery
" against the said Peter Vavasor and his
" heirs; for so it is concluded and declared by
" the deed indented, that the intent and true
" meaning of all the parties now is, and at
" the time of the said recovery was, that the
" said recoverors, &c. should stand seised, &c.
" to the only uses and intents by these pre-
" sents set forth and declared, and to no other
" use, intent or purpose; against which ex-
" press affirmation and declaration *by deed in-*
" *dented*, the said Peter or his heirs shall never
" be admitted or received to say, that no
" such uses were declared at the time of
" the said recovery, but that the said recovery,
" notwithstanding the said subsequent decla-
" ration, shall be construed and adjudged,
" by force of an use implied by operation of
" law, to be to the use of the said Peter and
" his heirs: but this declaration by the said
" deed indented has this operation in law
" against the said Peter and his heirs, that

" there was a present, certain, and compleat " agreement and declaration of the said uses " at the time of the said recovery, for so the " indenture expressly purports; and therefore " all that has been objected, that the decla- " ration ought to be precedent, or present " and certain, and compleat, and not as a " communication with reference to matter to " be put in writing afterwards, waswell argued: " but now this deed indented, in judgment " of law, doth import and witness against " the said Peter Vavasor and his heirs, for as " much as nothing appears to the contrary, " that there was a certain and compleat de- " claration of uses at the time of the said " recovery; and this stands upon pregnant " and apparent reason; for in as much as " Peter and his heirs are only to take advan- " tage for want of declaration of uses, reason " requires that this declaration of the said " Peter, by *his deed indented* should stand " against him and his heirs: and this case is " not like the said cases in 39 Ass. and 46 E. " 3. cited before; for in such case, if the " lands were held before in socage, the tenant " could not create or grant knight's service " which was not due before; and in the re- " cord the infant was not made heir to J. " But here, without question, Peter Vavasor, " the tenant of the land, might at the time of " the recovery, limit what use he would; and " Elizabeth is heir to Peter: and the reasons

" of the book of 35 H. 6. are, 1. The heir in " such case was not bound, because the words " of the charter were but by way of recital. " 2. That the words of the deed indented were " all the words of the lord, and not of the te- " nant, the heir of whom should be bound; " and that the brother of the half. blood was " not heir to the tenant, who was party to the " deed. But in our case, 1. It is not by " way of recital, but an express affirmation " and declaration. 2. It is the acknowledg- " ment and declaration of the tenant of the " land itself, and the said Elizabeth, one of the " plaintiffs, is heir to Peter Vavasor. Vide " 10 E. 3. 22, 24. *Rob. de Vale*'s case. And " as to the objection which was made, that the " said privilege to be without impeachment " of waste cannot be without deed, &c.; to " that it was answered and resolved, that if it " was admitted that a deed in such case should " be requisite, yet without question all the " estates limited would be good; although it " is admitted, that the clause concerning " the said privilege would be void. And " therefore if a man enfeoffs one by parol to " the use of A. for life, without impeachment " of waste, with divers remainders over, ad- " mitting that the clause of without impeach- " ment of waste, in such case should be void, " yet the estate for life with the remainders " over is well executed. And a difference was " taken between *indentures precedent*, which

" shall *direct* the uses of a subsequent recove-
" ry, and *indentures subsequent;* for when
" precedent indentures are made, and after-
" wards a recovery follows accordingly, there
" no averment can be taken by parol, that
" the recovery was to other uses than are
" declared in the indenture; for *nothing vests*
" *in any till the recovery is had;* and in such
" case a declaration *by parol* will not control
" the declaration *by deed:* but against an in-
" denture subsequent, declaring the uses of a
" recovery precedent, there averment may
" be taken, that other uses than in such in-
" denture are declared, were expressed and
" limited before and at the time of the reco-
" very, because *by such limitation the use and*
" *estate was vested according to such limitation,*
" *which cannot be divested by any declaration*
" *by indenture subsequent.* It was also resolv-
" ed (as appears before) that the said declara-
" tion subsequent by deed indented, should
" stand good against the said Peter Vavasor
" and his heirs; for as much as appeareth
" there was no other declaration of any other
" use; but if, after the recovery had, Peter
" Vavasor had sold, or given or charged the
" lands to others, which would be defeated and
" annulled by the declaration subsequent,
" there such subsequent declaration of itself
" should not subvert the mean estates, charges
" or interests, unless it could otherwise be pro-
" ved that by the certain and compleat agree-

" ment of the parties, the recovery was had
" to such uses; for by judgment of law such de-
" claration subsequent shall be sufficient,
" when no other certain and complete decla-
" ration or limitation of any other use, either
" at the time or before the recovery, be made,
" or any estate or interest mesne be vested;
" and as when a common recovery is suf-
" fered without consideration, it is in judg-
" ment of law, without any proof, to the
" use of him who suffers the recovery, if
" nothing is proved to the contrary; so when
" such subsequent declaration (as in the case
" at bar) is made, it shall be sufficient of it-
" self, without any other proof of the decla-
" ration of the same uses, either before or
" at the time of the recovery, if no other li-
" mitation of the use was made, nor any
" mesne estate or interest of any other there-
" by defeated. And because the intention
" of the parties is the direction of uses, in
" the argument of this case, many cases were
" put, where an act subsequent shall declare
" the intention of a general act precedent; as
" if tenant in tail has issue two daughters,
" and dies, and the elder enters into the
" whole, and afterwards makes a feoffment
" thereof with warranty, this is a lineal wa-
" ranty for one moiety, and a collateral war-
" ranty for the other, for the feoffment subse-
" quent shall declare the intention of the
" general entry, that it was only for herself

" or otherwise it would be a warranty which
" commenced by disseisin, for one moiety;
" and therewith agreeth Lit. cap. Gar. s. 160.
" So if the lord comes upon the tenancy, and
" takes and drives away an ox, if he im-
" pounds it, the taking shall be adjudged for
" a distress; but if he kills the ox, this act
" subsequent shall declare his intention *ab*
" *initio*, and shall make him a trespasser;
" and therewith agree 12 Ed. 4. 8. b. 28 H.
" 6. 5, &c. And as to the 4th reason or ob-
" jection which was made, that it was but
" matter of evidence, tending to prove to
" what uses the recovery was had, that has
" been answered before, that in judgment of
" law it is sufficient to declare the use, when
" nothing appears to the contrary, as in the
" case of indentures precedent; or when a
" recovery is suffered without any considera-
" tion, and without limitation of any use:
" but as to the point of pleading, it was re-
" solved, that as well in the case at bar, as in
" the case of an indenture precedent and
" recovery suffered without consideration,
" the usual form of pleading ought not to be
" altered; sc. to aver that the recovery was
" suffered to such uses; and, upon the evi-
" dence, the court ought to direct the jury
" according to law, or that they should find
" the truth of the case, as in the case at bar
" they do. And the justices in this case cited
" a former resolution in the point in the Court

" of Wards, between the same parties, Hill. " 21 El., the whole special matter as before " being found by office, and transcribed into " the same court, where by Sir Christ. Wray, " and Sir James Dyer, assistants to the said " court, and by the advice also of other jus- " tices, it was resolved, that the said inden- " tures subsequent were sufficient to declare " the uses of the recovery precedent, because " nothing appeared to the contrary. And as " to the fifth and last reason, or objection " which was made, it was answered and re- " solved, that no mischief or inconveniency " could ensue upon this construction, as was " pretended at the bar; but great inconveni- " ency would ensue on the other side, for " the inheritances of many subjects in Eng- " land depend upon such declarations sub- " sequent, or at least upon indentures which " in truth were delivered after the recoveries " suffered, or fines levied. And these resolu- " tions stand with the common opinion of " men learned in the laws, and common ex- " perience; and the alteration of such opi- " nions which concern assurances of inheri- " tances would be too dangerous."

And in *Jones* v. *Morley*(*b*), Lord *Holt*, in observing on that case, says, " It follows that " this fine cannot be to the use of the deed of

(*b*) 1 Lord Raym. 287.

" the 29th of January; because the fine to be " levied by the deed of the 29th, ought to " have been levied the Hilary term *next fol-* " *lowing*, exclusive of that Hilary term in " which the deed was made; but this fine was " levied the *same* Hilary term in which the " deed was made; and therefore there was a " variance between the fine and the deed, " and, consequently, room left for averment. " For if there is room for averment, where a " fine is levied of a time *after*, there is as " much reason to admit it, when a fine is le- " vied of a time *before*. For in both cases " the fine varies from the fine agreed to be " levied by the deed. There is the same " room for averment, where the declaration " of uses is by deed subsequent to the levying " of the fine. The only difference is, where " the uses of a fine or recovery precedent " are declared by a deed subsequent, the co- " nusor and his heirs, or any claiming under " him, are estopped to say that the fine was to " the conusor and his heirs,&c.; but a stranger " shall not be estopped to shew that. But " in case of a fine varying from a precedent " deed, no person is estopped to aver against " the deed, that the fine was to other uses. " Then, in this case, since there is a variance " between the fine and the deed, it is reason " that the wife should avoid it. For if the " deed had been pursued, she would have " had twelve months to see whether the hus-

" band would perform the marriage agree-
" ment; and if he would not, she might have
" refused to join in levying the fine; of which
" benefit she was deprived by the immediate
" levying of the fine. Then the husband, by
" the writing of the 31st January, agrees to give
" her the terms of her marriage agreement.
" And accordingly the fine was levied. From
" whence it appears manifestly, that the agree-
" ment contained in the deed of the 29th
" was relinquished, and the new agreement
" was designed to lead the uses of the fine."

It has already been observed, that after the statute of frauds and perjuries, a question arose whether there could be any subsequent declaration of the uses of a fine, or common recovery, and it was enacted by the statute of the 4 & 5 Ann. c. that a subsequent declaration *by deed*, shall be good. This statute adopts the principle in *Downman's* case, already cited, except that it does not in terms require the deed to be *indented*. It is however by no means clear that the common law did not require the circumstance of indenting; on the contrary it seems to have required an indenture as the means of creating an estoppell; and if by the common law the deed must be indented, the statute does not alter the law in this particular; and it is prudent at least to have the declaration by deed indented.

The points to be collected from *Downman's* case, *Jones* v. *Morley*, and the statute law, are,

1st, That there may be a declaration of the uses of a fine already levied, or a recovery already suffered.

2dly, That any *intermediate* conveyance will operate on the use which results in the mean time till the declaration, and govern the title so far as such conveyance extends, and of course preclude the right of defeating such conveyance by a subsequent declaration. The rule of law denies to men the right of derogating from their own acts (c).

3dly, That a subsequent declaration cannot control, either a declaration precedent to the fine or recovery, or cotemporaneous with it; nor affect any estate conveyed by the owner, as owner. With these restrictions, a subsequent declaration of uses will be good, at whatever time it is made during the life and the continuance of the ownership, of the person by whom the fine is levied, or recovery suffered. Even the lapse of several years will be no impediment to the right to declare uses of the fine or recovery. When the uses are once fixed by a declaration precedent or subsequent, they cannot be varied or altered by a subsequent declaration, except so far as such new declaration may be in exercise of a power reserved for that purpose. While, as between

(c) Brooke, Feoffment, pl. 1. Hob. 349.
Sir Edw. Clere's Case, 6 Co. 57.
Batty v. Trevilion, Moore 280, Anders. 245.
1 Ch. Cas. 100.
Brand's Case, Ley, 39.

several *declarations precedent*, attended with equal solemnities, the latter declaration will be effectual; as between several *declarations subsequent*, though attended with equal solemnities, the former of these declarations will govern the title.

Of declarations of uses in conveyances which pass an estate, to serve the uses, or which are ancillary to the assurance on which the uses are to arise.

When there is merely an executory agreement, and no conveyance, the party retains his ownership. The power of alienation remains in him, subject only to the agreement, as far as that agreement can operate.

After a conveyance has been made to uses, or to the intent that a common recovery shall be suffered or a fine levied to uses, the seisin or ownership is changed; a new title is created governed by this conveyance, and the former owner has no longer the power of varying the uses. It is a principle of law, that a man cannot derogate from his own act. Another rule more material to this point is, *quod meum est, sine facto sive defectu meo, amitti, vel in alium transferri non potest;* and of consequence, the interest acquired by third persons cannot be abridged or defeated without their concurrence.

Suppose tenant in tail to convey in fee to uses; this settlement is good against

himself. It is voidable only, and not void, as against his issue. It is in the option of the tenant in tail, whether he will levy a fine or suffer a common recovery, to give confirmation to the title under this conveyance, but in case he levies a fine, or suffers a common recovery, he has no power, except so far as he may retain an estate or interest under the former conveyance, to direct the uses of such fine or recovery. By a necessary consequence of law, the fine or recovery will have the effect of giving confirmation to the former conveyance, even in opposition to the intention of the parties to the fine or recovery (*d*).

The operation of a fine with proclamations will be to bar the issue, and render the conveyance indefeasible by them. A common recovery, if duly suffered, will have the more extensive operation of confirming the conveyance as against the issue in tail, and also against those in remainder or reversion expectant on the estate tail, and all other persons who have any interest by way of condition or collateral limitation subordinate to the estate tail (*e*). Nor is the rule confined to conveyances by tenants in tail; it is equally applicable to all estates, whether the conveyance is made by tenant for life, tenant in

(*d*) Goodright *v.* Mead, 3 Burr. 1703.
Cheney *v.* Hall, Ambl. 526.
Stapilton *v.* Stapilton, 1 Atk. 2.
(*e*) See Chapter on Common Recoveries, in Vol. I.

tail, or tenant in fee; notwithstanding the decided cases have, for the most part, arisen on conveyances by tenants in tail. And the rule equally extends to give confirmation to particular interests, as leases, grants for life, rent-charges, and the like, when they are prior to the fine, or recovery; and the recovery is duly suffered. In cases of this sort, the right is bound by the conveyance; an interest is acquired; and, in application to these particular instances, it is perfectly correct, that the use cannot be altered or varied, even while it is executory, without the consent of all persons concerned in interest. With their consent, in an instrument equally solemn with the instrument by which the uses were originally created, no doubt can be entertained of the right to alter or vary the former uses, and to add or substitute other uses. This necessarily flows from the principle, that *unum quodque dissolvi potest, eodem ligamine quo ligatum est.* This distinction however, must be kept in mind, that when there is a conveyance to uses, so that the uses are immediately executed by the statute, it is no longer competent to the parties to vary the title merely by an agreement or declaration of uses. There must be a *new conveyance*, or there must be a bargain and sale, or covenant to stand seised, creating uses to arise from the seisin of the person, who under the former uses takes a vested estate.

For example; when A. conveys to B. in fee, to the use of B. or C. for life, with remainder to D. in tail or in fee, each *cestui que use* has immediately a vested estate, and no change can be made in his ownership by an attempt to declare other uses, even with his consent. An estate of freehold once vested, cannot be defeazanced or avoided by an executory agreement. There must either be a surrender or conveyance of particular estates, or a new conveyance, bargain and sale, or covenant to stand seised of other estates. This is equally true, although there may be in the conveyance, a covenant to levy a fine or suffer a common recovery, with a declaration that the same shall enure to the uses limited by the conveyance. Notwithstanding such covenant or agreement, the conveyance has performed its office of raising the uses, and, by force of the conveyance, they become actual estates. The operation of such conveyances is not suspended, so as to give executory interests by reason of the subsequent covenant, agreement, or declaration. But when a conveyance is made to A. and his heirs, to the intent that a common recovery shall be suffered, or fine shall be levied, with a declaration that this recovery when suffered, or fine when levied, shall enure to certain uses; these uses will in the mean time, till the recovery is suffered, or the fine is

levied, remain in an executory state, and while the uses are executory, they may be defeazanced, altered, or varied (*f*), by the agreement of all persons concerned in interest; and by the persons concerned in interest, must, it is apprehended, be understood the persons who are to be benefited by the uses, and not the conusee, demandant or tenant, merely as such. These observations will shew the full force of the distinctions which prevailed in *Goddard* v. *Complin* (*g*), *Stapilton* v. *Stapilton* (*h*), *Moody* v. *Moody* (*i*), *Cheney* v. *Hall* (*j*), and *Goodright* v. *Meade* (*k*). As these cases involve a large portion of useful learning, they will be stated, as far as they are material to the points now under consideration.

In *Goddard* v. *Complin*, "Tenant in tail "mortgaged for years, and afterwards upon "marriage, in consideration thereof suffered a "recovery to settle a jointure; and the ques- "tion was, whether this recovery should en- "ure to make good the mortgage, *it being* "*designed for the marriage settlement only?* "And it was answered, if no recovery had "been, there could have been no jointure, "and the jointress could not have avoided

(*f*) Andrews' Case, Moore, 107. pl. 349.
(*g*) 1 Ch. Cas. 119.
(*h*) 1 Atk. 2.
(*i*) Ambl. 649.
(*j*) Ambl. 526.
(*k*) 3 Burr. 1703.

" the mortgage; and she is in by the act of " her husband, and no subsequent act of the " husband could avoid his own act precedent. " And it was also declared, that if tenant in " tail confess a judgment, &c. and suffer a " recovery to any collateral purpose, that " recovery shall enure to make good all his " precedent acts and incumbrances."

In *Stapilton* v. *Stapilton*, " By a deed " dated on the 21st of August 1661, Philip " Stapilton, who was tenant of the premises " in question for 99 years, if he should so long " live, remainder to trustees for life, (it must be " understood to preserve contingent remain- " ders,) remainder to his first and other sons in " tail male, remainder to his right heirs. And " having two sons, Henry and Philip, *they*, " by deeds of lease and release, the 9th and " 10th of September 1724, reciting that for " settling and perpetuating all manors, &c. " in the name and blood of the Stapiltons, and " for making provision for his two sons, &c. " for preventing disputes and controversies " that might possibly arise between the said " two sons, or any other person claiming an " interest in all or any of the estates therein- " after mentioned, and for barring all es- " tates tail, and for answering all and every " the purpose and purposes of the parties " thereto, and for and in consideration of " the sum of 5s. release and confirm to *Thomp-* " *son* and *Fairfax* all those manors, &c. to

" have and to hold to them, their heirs and " assigns, to the use (as to part) of *Philip* the " father, his heirs and assigns for ever, and " as to another part, to the use of *Philip* the " father, for life, remainder to *Henry* the " son for life, remainder to trustees to preserve " contingent remainders, remainder to his first " and every other son in tail male, remainder " to *Philip* the son for life, remainder to " trustees to preserve contingent remainders, " remainder to his first and other sons in tail " male, remainder to the daughters of *Henry* in " tail, remainder to the daughters of *Philip* the " son in tail, remainder to the right heirs of " *Philip* the father; and as to the remaining " part, to the use of *Philip* the father for life, " with like limitations in the first place to *Phi-* " *lip* the son and his issue, and then to *Henry* " and his issue, remainder in fee to the father."

" There were covenants to suffer a recovery " within 12 months, and likewise for further " assurances. To this deed, the heir of the " surviving trustee in the deed in 1661 was " not a party. But by deeds of lease and re- " lease, dated the 28th and 29th of Septem- " ber, 1724, to which the heir of the surviving " trustee of the deed of 1661, was a party, " the father and two sons, make *Thompson* " and *Fairfax*, tenants to the *præcipe*, in order " to suffer a recovery for the purposes men- " tioned in the former deeds of the 9th and " 10th of September.

" Before any recovery suffered, *Henry* died, " leaving issue the plaintiff.

" Afterwards, by lease and release, the 12th " and 13th of April 1725, to which the heir " of the surviving trustee of the deed of 1661 " was a party, *Philip* the father and *Philip* " the son covenant to suffer a recovery, in " which *Thompson* and *Fairfax* were to be " tenants to the *præcipe*, to the use, as to " part, of *Philip* the father, his heirs and " assigns, and as to the other part, to the use " of *Philip* the father for life, remainder to " *Philip* the son in fee.

" In Trinity term 1725, a recovery was " suffered, in which were the same tenants " to the *præcipe*, the same demandant, and " the same vouchees (except *Henry* who was " dead), as were covenanted to be by the " first deed; it was likewise suffered within " twelve months after the first deed.

" The father, *Philip Stapilton*, being dead, " the plaintiff, as son and heir of *Henry*, " brought his bill to establish his title to the " premises in question, and for the whole " estate as tenant in tail, under the old settle- " ment, and to be let into possession, and for " an account of rents received by *Philip Sta-* " *pilton* the son, due since the death of the " plaintiff's grandfather, and to have the same " applied for the plaintiff's benefit during his " infancy, and for an injunction to restrain " the defendants from receiving any more " rents.

" The defendant *Philip*, the son, by his an-
" swer, confesses the several deeds before
" mentioned, but says, *Henry* was a bastard ;
" and that by virtue of the deed of 1725, and
" of the recovery, he was intitled to the whole
" estate in question.

" Upon an issue, directed, *Henry* was
" found illegitimate, and the cause was now
" heard upon the equity reserved, when the
" counsel for the plaintiff waiving the claim
" to the whole estate, insisted as one point,

" That the recovery suffered in Trinity term
" 1725, should enure to the use of the deeds
" of the 9th and 10th Sept. 1724, and not to
" the uses of the deed in 1725.

" It was said that the uses when once de-
" clared cannot be altered, unless all the par-
" ties intitled to the uses join in the new de-
" claration, and *Henry* did not join in the deed
" of 1725.

" For the defendant, it was argued, that
" *Henry* being dead before the recovery was
" suffered, the intent of the parties, in the first
" deed, could not be pursued ; for the plain-
" tiff (supposing him legitimate) claims pa-
' ramount his father, and the deed of 1661 ;
" therefore, as the recovery could not substan-
" tiate the first deed supposing him legitimate,
" it shall not substantiate it now he is found
" illegitimate.

" The plaintiff upon the death of his father
" had not any use vested in him, for the intent

" of the parties was, that the uses should arise " out of the recovery; the ends recited could not " be come at without a recovery, and where the " intent of the parties is, that the uses should " pass by fine or recovery, nothing will pass " by the deed, that is intended only to declare " the uses; the fine and recovery all make " but one conveyance, Cro. Jac. 643. 2 Ro. " Rep. 68. 2 Lev. 306. 1 Vent. 279. 2 Lev. " 54. Cromwell's Case, 2 Co. 69. b.

" Lord Chancellor.—The plaintiff in this " case is intitled to have a decree;—

" Upon this case there are, his Lordship " observed, two general questions:

" 1st. Whether the plaintiff had any estate " in law, by virtue of any of the conveyances " or by the recovery? 2dly. If he had no es- " tate at law, or only a defeasible one, whether " he was intitled to have the benefit of this " agreement, and to have it carried into execu- " tion here?

" The first question consists of two branches:

" 1st. Whether the lease and release of the " 9th and 10th of Sept. 1724, will amount to " a good declaration of the uses of the reco- " very, notwithstanding the subsequent deed " of April 1725?

" 2dly, If not, whether the recovery of Tri- " nity term 1725, having barred the estate " tail, will make good any estate which pass- " ed by the lease and release of the 9th and " 10th of September, 1724?

" As to the first; whether the lease and re-
" lease is a good declaration of the uses of the
" recovery? I am strongly inclined to think it
" will amount to a good declaration: this
" question depends on the construction of
" law, and the authority of cases upon the
" declaration of uses. It is true, where there
" is an agreement to suffer a recovery, and
" uses are declared, if the recovery is after
" suffered, though it varies in point of time
" from the recovery covenanted to be suffered,
" yet if there is no subsequent declaration of
" uses, the recovery will enure to the uses so
" declared. And before the statute of frauds,
" if the deeds declaring the uses had not been
" pursued, a parol declaration of uses would
" have been let in; but if there is a deed de-
" claring the uses, and the common recovery
" is suffered accordingly, that would, before
" the statute, exclude a parol declaration of
" new uses."

" But even now, there may be a subse-
" quent declaration of uses, but that decla-
" ration must be *in writing*, *(l)* and such a
" new declaration of uses depends upon the
" agreement of the parties; therefore, though
" it is said at the bar, that the declaration
" of uses is in the power of the tenant in
" tail, and that he may declare new uses, I
" take that not to be law; for such subsequent

(*l*) It must be by *deed*; and query if such deed must not be *indented*?

" declaration, must be by all the parties con-
" cerned in interest; and in the case of the
" Countess of *Rutland*, 5 Co. 25. it is not laid
" down there, that the tenant in tail, might
" declare new uses, but said, whilst it is *di-*
" *rectory* only, new uses may be declared, and
" the meaning of that is, that as the uses must
" arise out of the agreement of the parties,
" the parties may change the uses, but that
" must be done by the mutual consent of all
" the parties concerned in interest, and in that
" case it was a mutual agreement of all parties."

" And in the case of *Jones* v. *Morley*, (*m*) 2
" Salk. 677, there was a variance as to the
" time of suffering the recovery, from the
" deed declaring the uses, and there held that
" a declaration of uses was equally good,
" whether by deed or not, if in writing.

" But in the present case, the second agree-
" ment not being between all the parties con-
" cerned in interest, ought not to control the
" first declaration, and especially as this re-
" covery was suffered within the time pre-
" scribed by the first deed, and between the
" same demandant and tenant.

" The consideration for suffering the reco-
" very was good both in law and equity, and
" there is no case to warrant me to say, the
" first agreement is not good and binding,
" or that the tenant in tail could by his own
" agreement afterwards change the uses."

(*m*) Before the statute of 4 and 5 Ann.

" But if it was doubtful whether the reco-
" very suffered in 1725 should enure to the
" uses declared by the deed of 1724, I am
" of opinion the recovery will operate to
" make good those estates, which passed by
" the deed of 1724.

" But to this two objections have been made.
" 1st. That the uses must be governed by,
" and operate according to, the intention of
" the parties; therefore the subsequent re-
" covery being suffered to other uses, those
" uses will take place. 2dly. If any uses did
" pass by the deed in 1724, yet this recovery
" will not make those uses good, because
" the subsequent recovery was suffered, to
" particular uses, declared by the deed of
" 1725.

" As to the first objection; I am of opi-
" nion that a use did pass by the deed of
" 1724, and according to the intention of
" the parties. It is certainly true, that, ac-
" cording to the statute of uses, the gene-
" ral doctrine is, that the uses shall be
" executed according to the intention of
" the parties; but both the courts of law
" and equity consider what was the general
" and final intent of the parties. In this
" case, their intention was that the estate
" should pass, and wherever a court of law or
" equity find that the general and substan-
" tial intent of the parties, was that the es-

" tate should pass, they will construe deeds " in support of that intention, different " from the formal nature of those deeds " themselves; as a feoffment, to serve the " intention of the parties, shall operate as a " covenant to stand seised. The intent here " was, that the estate, in point of law, should " pass by the deed of 1724, and that the " uses declared by that deed should vest in " the mean time till the recovery suffered.

" This is an answer to the objection " arising from the statute of uses; but " there is another question, what estate pass- " ed by the deed of 1724?

" It was a defeasible estate, to serve the " uses of that deed; and so is the resolution " in *Machell* v. *Clark* in Farr. 18. Salk. 619. " That tenant in tail may convey a base fee, " and estate defeasible by the entry of the " issue.

" The next question is, whether the reco- " very suffered in 1725 did enure to make " good, and render indefeasible those base " estates created by the deed of 1724?

" And I am of opinion they are made " good. The objection to this is, that the " recovery was suffered in pursuance of the " deed in 1725, wherein there were new " uses limited, but the only uses which make " any difference in that deed are to *Philip* " the son and his heirs, so there is no body

" concerned in the question but *Philip* and " his heirs.

" It has been argued by defendant's coun- " sel that, if the first declaration of uses is " in general to prevail, purchasers of estates, " though they have a recovery for strength- " ening their title, with a declaration of the " uses of the recovery to themselves and " their heirs, cannot be safe, for the vendor " may defeat such declaration by a prece- " dent one, to different uses; but in such " cases I think a recovery would not enure to " make good such former declaration of " uses, but only the uses of the purchase.

" It is admitted, that if tenant in tail con- " fesses a judgment, or a statute, or enters " into a bond, and afterwards suffers a reco- " very to bar the estate tail, it lets in the " precedent judgment, &c. And it is as " clear, if a tenant in tail makes a lease " not warranted by the statute of the 32 Hen. " 8. if he suffers a recovery, that lets in the " lease and makes it good.

" There are so many cases of this kind, " that it is not necessary for me to mention " them.

" This case *is different from those that turn* " *only upon the point of the effect of a mere* " *declaration of uses;* for a mere declaration " of uses subsists only upon the agreement " of the parties, and in such cases, where " the agreement has been changed by mu-

" tual assent of all parties, there a recovery " shall enure to make good such last agree- " ment or declaration.

" But if the *estate was vested*, notwithstand- " ing such declaration of uses, yet the reco- " very has always been held to make good " such defeasible estate; for the prior lease, " charge, or estate made by tenant in tail, is " only defeasible by the issue, by virtue of " the statute *de donis*, which was made to " protect the issue against the alienation of " the tenant in tail; therefore the issue would " avoid such lease, &c. but not the tenant in " tail himself; but when, by the recovery, " he has gained to himself a fee, all the rea- " soning for avoiding an estate, made by te- " nant in tail is gone, for the issue is barred " by the recovery. The reason why the is- " sue may avoid a charge made by tenant in " tail, is upon account of the protection of " the issue, and his estate, under the statute " *de donis*, and of the privity of the estate " tail; but when the privity is gone, the rea- " son ceases, and to this purpose is the " case of *Croker* v. *Kelsey*, Sir W. Jones, " 60.

" In the case of Lord *Derwentwater*, Mod. " Cases in Law and Equity, 172, 2d part, the " question was, whether a papist, tenant in " tail, suffering a recovery, and declaring the " uses to himself in fee, gained a new estate " within the 11th and 12th of Will. 3. or was

" in of the old use? And it was held, the 5th of " Geo. I. by four judges out of five, appoint- " ed delegates to determine appeals from the " commissioners of forfeited estates, that he " was in of the old use; and I take it for law, " that a tenant in tail suffering a recovery, is " in of the old use, and that the estate is dis- " charged of the statute *de donis;* and there- " fore I am of opinion that the recovery has " made good this defeasible estate, created by " the deed of 1724.

" It has been objected, that if the plaintiff " has any title, his remedy is at law, but I " think it is more properly here; he is an in- " fant, and has come recently into this court, " nor do I think this case depends intirely " upon the point of law; for I am of opinion " that the plaintiff is intitled to have an exe- " cution of the agreement, as a good and " binding agreement in this court."

In *Moody* v. *Moody*, (*n*) Edward Moody was tenant in tail, under his father's will, with a contingent remainder in fee to himself, and being about to marry, in 1709, he conveyed (by way of immediate use) to the use of himself and his intended wife, for their lives, with remainder to the heirs of their bodies, remainder to himself and his wife in fee.

Edward Moody afterwards made his will, and devised part of the estate, of which he

(*n*) Ambl. 649.

had suffered a recovery, to his younger son, after the death of his wife.

The wife died, and the eldest son set up a title to the estate.

The bill was brought by the younger son, and Lord *Camden*, Chancellor, gave his opinion: 1st. "That the recovery was a "confirmation of the settlement, and not a "destruction of it; considered as a bar of "the old entail only."

In *Cheney* v. *Hall*, (*o*) Gerard Walker, the father, by settlement on his marriage in 1706, conveyed an estate in Derbyshire to the use of himself for life; remainder as to part to his wife for life, by way of jointure, remainder, as to the whole, to the first and other sons of the marriage. There was issue of the marriage Gerard Walker, the eldest son, and other children.

In 1733, the son on his marriage conveyed part of the estate, by lease and release, to the use of himself for life; remainder to his intended wife for life; remainder to the heirs of the body of the wife; remainder to his own right heirs.

In 1746, the father and son mortgaged the premises to Henry Peach for 1000 years, to secure 300l. and suffered a common recovery, and declared the uses to the mortgagee, and then to the father for life, with the remainder to the son in fee.

(*o*) Ambl. 526.

In 1749, Henry Peach purchased the son's reversion for a valuable consideration, and took a conveyance to himself in fee.

Afterwards Walker the son died in 1751, leaving a widow, and the defendant, Gerard Walker, the eldest son of the marriage, and several other children.

Afterwards Walker the father died, in 1756. The widow of the father was still alive.

The question was whether the common recovery in 1746, should enure to the uses of the settlement of 1733?

Lord Chancellor was clear of opinion, that the common recovery enured to the uses of the settlement of 1733. "In this "case," he observed, "there is a conveyance "and transmutation of possession, and the "remainders are not void."

In *Goodright* v. *Mead*, (*p*) John Shilson, the father of the defendant Nicholas Shilson, being seised to him and the heirs male of his body, of the premises in question, the remainder to his own right heirs, by lease and release, dated 24th and 25th October 1742, previous to his marriage with Susannah Smerdon, conveyed the same to trustees, to the use of himself for life; remainder to the trustees to preserve contingent remainders; remainder to the use of the said Susannah,

(*p*) 3 Burr, 1703.

for her life; remainder to his first and other sons by the said Susannah in tail male.

The marriage took effect, and they had issue Nicholas Shilson, the defendant, their only son.

In Trinity Term 1761, the said John Shilson, suffered a common recovery; and by deed dated 24th June 1761, he declared the uses of the said recovery to be, to —— Lucas, his heirs and assigns, in trust to sell the said premises, &c.

The said —— Lucas, by lease and release, dated 27th and 28th October 1763, in pursuance of the trusts of the said deed last mentioned, conveyed the said premises to Elizabeth Tyrrell, the lessor of the plaintiff, and her heirs.

The said John and Susannah Shilson are both dead.

The question is, whether, upon the facts stated, the plaintiff is intitled to recover the said premises.

And by Mr. Justice *Wilmot*, "it is now "fully settled, "That a release or bar- "gain and sale by a tenant in tail, will con- "vey a base fee; a defeasible estate; to the "releasee or bargainee: though it must be "allowed, that the old notion was, and "even in Lord *Coke's* time, that a tenant in "tail could not convey an estate longer than "for his own life. But that notion is now "overruled; and the contrary settled."

Lord *Mansfield* observed, "It is now "settled, that a release, or bargain and sale "by a tenant in tail, gives a base fee, void- "able by the issue in tail. This is the prin- "ciple of *Machil* v. *Clarke*, and many sub- "sequent cases have been grounded upon "it; particularly that of *Stapilton* v. *Stapil- "ton.*

"Besides the common recovery has made "good this defeasible estate.

"Either ground makes an end of this "question. The recovery takes off the fetters "of the statute *de donis.*"

Mr. Justice *Wilmot* concurred. He said, "the tenant in tail had a fee originally: and "a common recovery leaves him a fee again, "by removing the bar and fetters imposed "by the statute. When the bar and fetters "are removed, it then becomes just the same "case as if he had been tenant in fee simple "*ab initio.* And though formerly it was "doubted, whether a tenant in tail could, "any otherwise than by a feoffment, grant "any thing more than for his own life; yet "it is now settled, by the case of *Machil* v. "*Clark*, That he may, by bargain and sale, "or by lease and release, pass a base fee; "and if so, it is in his power to limit the re- "mainder as he pleases. And it makes no "difference, whether it is limited to the use "of the bargainee, or the releasee, or to a "stranger, or to himself for life with re-

" mainders over: for the base fee feeds all " the uses that are limited upon it; till " avoided by the entry of the issue in tail.

" And Mr. Justice *Yates* added, a lease " and release, or a bargain and sale by the te- " nant in tail, is not absolutely void; but " conveys a base fee, defeasible by the entry " of the issue in tail. This is now settled by " the case of *Machil* v. *Clark*: and many " determinations and conveyances are found- " ed upon it."

Mr. Justice *Aston* concurred, the Court were, therefore, unanimously of opinion, that the recovery enured to the uses of the settlement, and that the plaintiff had no title.

When no uses are declared the use will result to the former owners, according to their former ownerships, *viz.* to joint tenants, as joint tenants; to tenants for life, as tenants for life; to tenants in fee, as tenants in fee:(*q*) but the use which results to a tenant in tail, will be a use of the estate, which he conveys to the conusee in the fine, *viz.* a fee simple when a discontinuance is created, and when no discontinuance is created, then a base or determinable fee, commensurate with the ownership of the estate tail.(*r*)—An estate

(*q*) Argol v. Cheney, Latch 82.
Roe v. Popham, Douglas 25.
(*r*) Waker v. Snow, Palm. 369.
Moxon v. Moxon, in the Exch. 1777.
Hodges v. Fowler, Exch.

tail will never be taken by way of resulting use, on a fine levied, or any other conveyance made, by tenant in tail. All the cases from which it has been collected that the use resulting on a fine, by tenant in tail, will give an estate tail, are now understood to apply only to the degree of ownership, and not to the quality of the estate, as descendible to the issue in tail.

But the use will result in those cases only, in which, from the absence of declared intention, and also of consideration, there is no reason to give the use to the conusee. Whenever the intention, or a consideration, requires it, the legal estate will remain in the conusee, and not be affected by any resulting use; so that the conusee may have the benefit of the fine, without any express declaration of use in his favor. In *Altham* v. *Anglesea*, (*p*) a fine was levied, and, after an interval of several years, a common recovery was suffered, in which the conusee was named tenant, and from this circumstance alone it was inferred, that the legal estate was to remain in the conusee, so as to make him tenant: and the presumption of a resulting use was rebutted: The like point was determined in *Thrustout* v. *Peake* (*q*). In the latter case the language of the *Chief Justice* was, "the

(*p*) Nightingale v. Ferrers, 3 P. W. 207. Gilb. Eq. Cas. p. 16.
(*q*) Strange, p. 16. Salk. 676.

" fine being levied, and no use declared, the " recovery being immediately suffered of the " same lands, and the writ of entry brought " against the conusee in the fine, shews that " the intent of levying the fine was to make " a tenant to the *præcipe*."

Also in *Roe* v. *Popham* (*r*), the language of *Lord Mansfield*, was: " The case cited by " Mr. *Morris*, *Altham* v. *Anglesea*, is good " law. There; there was evidence to rebut " the resulting use; but here I see no " proof of intention on the part of the rever- " sioner in fee. He was not a party to the " marriage articles. If he had been, that " would have been strong evidence against " any resulting use to him. The form of a " fine is to give a title to the conusee; but, " in truth, it is for the convenience of the " conusor; and, from the constant usage, " the presumption is, that it is levied to his " use. This indeed is liable, like all other " presumptions, to be encountered by con- " trary evidence; but here the reversioner in " fee has done nothing to rebut the presump- " tion." Titles depending on resulting uses, on the one hand, and an implied use in the conusee on the other hand, are viewed with great suspicion, from an apprehension, that there may have been a consideration, to rebut the resulting use, or there may be the want of a

(*r*) Dougl. p. 24.

consideration to complete the title of the conusee. To meet these difficulties, it is prudent to have a deed to lead, or else a deed to declare, the uses of the fine. In deeds to lead the uses of fines, the execution of the deed by the conusee, is not deemed of essential importance. Nor is it deemed of great importance in declarations of uses, when the declaration is nearly cotemporaneous with the fine, and there is no change in the possession. But as often as there is some and merely a short interval, between the fine and the declaration of uses, the concurrence of the conusee is required. And, in all cases, it is proper by way of obviating the difficulties, of future purchasers, that the deed to lead and also the deed to declare the uses of a fine, should be executed by the conusee as well as by the conusor. It often happens that the deed has not been executed by the conusee, and that, on account of the death of the conusee,or from other causes,the execution of the deed by him is impracticable. Under these circumstances, the conveyancer is led to consider, whether from the nature of the transaction, the continuance, or the change, of possession ; or from other facts, with which the title is attended, there is any occasion for particular caution, and to treat the title as doubtful. In general, the conusee in the fine, is merely named for form, and has no interest: and unless he has had the posses-

sion, or been in the receipt of the rents, or there is reason to suspect that he was a mortgagee, or intitled, in some other manner, the title may be safely accepted, without pressing for any declaration by those who alone can obviate the difficulty.—The only mode of investigating the fact, whether there is any interest derivable under the fine, from or through the conusee as a beneficial owner, is to make the inquiry of the conusee if living, and if dead, of his heir and also of his personal representative. This in general, is the utmost extent, to which an inquiry can be directed: but particular cases, as the assertion or rumour of a claim, will direct the inquiry to the channel, through which it is likely that information may be obtained.

It is also to be added, that in conveyances either to uses, or to the intent that a fine may be levied, or a recovery suffered, to uses, the execution of the deed of uses by the conusee in the fine, or by the tenant in the recovery, is deemed of less importance, and immaterial, except by those whose practice is particularly cautious: for whoever receives the estate, must receive it upon those terms alone, on which it is conveyed: and the conveyance itself contains all the information that can be reasonably required, concerning the uses. They however who expect, that,

even in these cases, the deed shall be executed by the conusee in the fine, or by the tenant in the recovery, justify their practice, by contending that this is the only evidence by which they can be satisfied that a fine was levied, or recovery suffered to these uses. Similar cautions would render the transaction of business more difficult than it is already found, and there is already a complaint against the unnecessary difficulties imposed, by that which is termed cautious practice. At the same time experience justifies the observation, that most of the cautions observed by conveyancers, are the result of experience, and warranted by the difficulties with which the transactions, relating to the transfer of property, are surrounded. The history of a professional life, devoted to the investigation of titles, would prove that the utmost ingenuity, caution, or industry, is not equal to guard against all the dangers to which the change of property is exposed; sometimes from the fraud, and at other times from the ignorance of the former proprietors: and every purchaser expects extreme caution to be observed in his particular case, that he may not be the victim of such fraud or ignorance.

Agreements to lead, and to declare, the uses of fines, are generally found in instruments, which have other objects. In most instances, they are merely an addition to a

conveyance, contained in a former part of the instrument, and there is merely a covenant to levy a fine, with a declaration that the same shall enure to the uses previously declared; or a recital that a fine has been levied, and that no uses have been declared of the fine, or that no uses have been declared of those particular lands, which are the subject of the deed: and then the deed proceeds to declare uses of the fine, according to the intention of the parties, either by a full and express declaration of the uses, as the plan of the instrument requires; or by a reference to the uses previously declared. Of course in instruments of this description the other objects of the deed, must, in a great measure, govern its form, and direct the number of parties; but a simple deed to lead, or declare the uses of a fine, has the following parts;

1st, The denomination or style of the deed;
2d, The date;
3rd, The names of the parties;
4th, The recitals;
5th, The testatum clause;
6th, The agreements to levy the fine or the recovery;
7th, The uses which are declared.

Under each of these heads, may be introduced those observations, which govern the general practice, in preparing deeds to lead, and deeds to declare the uses of fines;

and very little attention will enable the reader to apply these observations to deeds of a more complex nature, which ought to contain an agreement to lead, or to declare the uses of a fine, with or without a covenant, that a fine shall be levied. In the progress of these observations, it will be found, that the practice is directed to obviate all objections, arising from the cases which have been introduced, for the purpose of shewing those resolutions more immediately applicable to the learning on this subject.

1st, *The Denomination or Style of the Deed.* In general the uses of fines, are directed by *indenture*, but they may be directed by *deed poll.* In short they may be limited, by mere writing, except that declarations of the uses of fines, already levied, must in consequence of the provisions of the 4th and 5th of Ann, be by *deed.* It is also to be observed that *Downman's* case required the deed to be *indented.* Also, when there is to be a variation of uses, as expressed in a former instrument, there must either be a change in the circumstances under which the fine was agreed to be levied, or the second declaration must be by an instrument equally solemn with the instrument containing the former agreement. From the cited cases, particularly from the Countess of *Rutland's* case, &c. it may be collected, that when there is a variation in

the mode of levying the fine, the second agreement will govern the uses, although the former agreement was by deed, while the latter agreement, was by mere writing, without deed.

It is also to be observed, that for all the purposes of this question, a deed poll and indenture, are equally solemn; but an agreement under hand, or under hand and seal, and not delivered, is not equally solemn with an instrument attended with the ceremonies of sealing and delivery. The latter is a deed: the former is merely an instrument in writing under seal.

2dly, *Of the Date.*—Deeds to lead the uses of fines are, from their nature, dated and executed before the fine is levied; while deeds to declare the uses of fines already levied, suppose the fine to be levied, and of course, are subsequent in date. But it often happens that a covenant is entered into, to levy a fine, as of a preceding term, so that the fine, is by legal relation, anterior to the date of the deed, and yet deeds of this description are considered as deeds to lead the uses of fines. Sometimes also a fine is recited as acknowledged, and intended to be levied, as of a subsequent term, and uses declared of this fine are also to be deemed as uses *directory*, and not as uses declaratory. That alone is properly a declaration subsequent, which is grounded on a perfect

fine, so that the uses will arise, and be executed the moment the deed has received its perfection. The date is also material in cases like that of *Jones* and *Morley*, as the means of ascertaining the time within which a fine is to be levied, so as to be brought within the influence of the agreement by which the uses are declared.

3dly, *Of the Parties.*—The proper parties to declare the uses of a fine, are the conusors on the one part, and the conusees on the other part: but when several conusors have different shares, as joint-tenants, tenants in common, and coparceners; or different interests, as for life and in fee, they are generally arranged as parties of different parts; as A. B. of the first part, C. D. of the second part, and so on; and all persons who are interested in the assurance to be made by the declaration, should be consenting parties, and of course should be named among the parties, so as to give their consent in the operative part of the deed. As for instance; when a married woman is a trustee or mortgagee, and a fine is to be levied by her and her husband to make an effectual conveyance of her estate, the *cestui que* trust should be a party to join in the declaration of the uses, and, of course, the number of parties will vary with the circumstances. *Beckwith's*

case, (*s*) with the power of a husband to declare the uses of a fine by him and his wife, is noticed in the former volume. (*t*) It has also been noticed, that those persons who have aliquot parts, cannot declare the uses of more than their particular parts; nor can persons, who have partial interests, declare the uses for any period beyond their own ownership; so that a declaration by the owner of one share, or one estate, will not bind the owner of another share, or of another estate. (*u*).

4thly, *Of the Recitals.* — The recitals should, for the most part, shew the state of the title, and the object of levying the fine. When a fine is levied by husband and wife, the presumption of law, till the contrary is shewn, is, that the husband and wife are seised in right of the wife; and as often as the husband is the owner in his own right, this fact should be disclosed by the recitals, or inserted as part of the description of the parcels. This is not essential, with a view to the operation of the assurance; but it may materially assist the future investigation of the title. Also, when

(*s*) 2 Co. p. 57.
(*t*) Ib. p. 314.
(*u*) Nightingale *v.* Ferrers, 3 P. W. 207. Roe *v.* Popham, Dougl. 24.

a fine is levied, as is very common, for barring estates tail, &c. the commencement of the estate tail should be disclosed, accompanied with such other recitals as will lead to the information, that the fine is a competent assurance for attaining the object intended to be accomplished. No objection is more common than one arising on a fine, levied for barring estates tail, and at the same time conveying the fee-simple. The ground is, that it does not appear, that the fine was effectual for this purpose; and the objection takes its rise from an apprehension, that there may have been remainders or reversions, which could not be barred by means of a fine. The better opinion seems to be, that the purchaser cannot sustain this objection, unless he can actually prove, or at least raise the inference, that there were reversions or remainders outstanding in other persons than the parties to the fine. Even in cases in which the party had an estate tail, with the immediate reversion in fee by descent, and he levied a fine with proclamations, instead of suffering a common recovery, it was a very common objection that there might have been incumbrances affecting the reversion, and that the title could not be safely accepted, until a common recovery had been suffered, so as to bar the reversion, and consequently all incumbrances affecting that estate. This objection is no

longer tenable. It is decided by *Sperling* v. *Trevor*, 7 *Ves. Jun.* 497. that, even under these circumstances, the title will be deemed good, without a common recovery, unless the purchaser can shew that there are incumbrances, affecting the reversion, and not reached by the operation of the fine. As often as the object of the deed is to declare the uses of a fine already levied, there should be a recital of the fine, with a further recital, that no uses have been declared of the fine; or, as the case requires, that no uses have been declared of the fine, as far as the same relates to or concerns the lands of which uses are to be declared.

5thly. *The Testatum Clause.* — The general objects of the deed are stated in this clause, and each testatum clause varies with the circumstances by which it is dictated. Sometimes the clause runs in this form :—" For barring, docking, and destroying all estates tail, &c. and for settling and assuring the messuages, &c. to the uses, &c. hereinafter limited and declared of and concerning the same." In other instances, the references are still more general; as, " for settling and assuring the messuages, &c. to the uses hereinafter declared concerning the same;" or when the recitals fully state the object, and the agreement to levy the fine, the testatum clause will be to this

effect:—"In pursuance and performance of "the hereinbefore recited agreement, and "for carrying the same into effect." The precedents in the Appendix will afford examples of these clauses. The general rule to be observed, is to express every thing that may elucidate the title, and assist in the future investigation of it; and carefully to avoid all reference to any fact, which may shew a defect in the title, or raise a difficulty concerning it, on any future occasion. No reference should be made to estates tail, except there are estates of that description. It was formerly a very general practice, to convey by fine and declaration of the uses. In modern practice, a lease and release are added. It is very probable, however, that the heavy stamp-duties will render it convenient, especially in small purchases, to resort to the old practice; and settlements as well as purchases may be accomplished, merely by means of the fine and declaration of uses, without the addition or intervention of a conveyance by lease and release, or any other grant. The fine, when an actual conveyance, produces every effect which can be produced, even with the addition of a lease and release, and the fine operates as a conveyance as often as the conusor has a seisin in possession, reversion, or remainder. In this clause also, the consideration is to be expressed; and when it is expressed, the

directions given in the chapter of Releases ought to be observed. At the same time it is to be noticed, that an actual, or a nominal, consideration is not an essential part of this assurance. In reference to the rules of the common law, the will of the party is sufficient to raise or direct the uses, as against him or his heirs. A consideration, however, may be material to support the deed against creditors and subsequent purchasers, or against creditors claiming under a commission of bankrupt. When a consideration is paid, the receipt should be acknowledged in like manner as in other deeds, made for a valuable consideration. In deeds to lead the uses of fines, there is generally a covenant to levy the fine. It is generally in this form:

And the said , for himself, his heirs, executors, and administrators, doth hereby covenant and agree with the said his heirs and assigns, in manner following (that is to say) That shall and will, at the proper costs and charges of the said , in or as of term now last past, or before the end of term now next ensuing, acknowledge and levy unto the said and his heirs, before his majesty's justices of the court of common pleas at Westminster, one or more fine or fines, *sur conuzance de droit*

come ceo, &c. with proclamations to be thereupon had and made according to the form of the statutes in that case made and provided, and the usual course of fines in such cases used of the said hereby released or otherwise assured, or intended so to be, with the appurtenances [*or*, ALL that, &c.] by the names and descriptions of

or by such other apt and convenient names, number of messuages, and acres, quantities, qualities, and other descriptions to comprise the same, as by the said

his heirs or assigns, or his or their counsel in the law, shall be reasonably advised or devised and required.

In this covenant, the following parts deserve attention:

1st, Of the covenantor;

2dly, The person with whom the covenant is to be entered into;

3dly, The person by whom the fine is to be levied;

4thly, The time within which it is to be levied;

5thly, The persons to whom it is to be levied;

6thly, In what court;

7thly, Of what parcels; And,

8thly, Whether with proclamations.

The covenant, in its most simple state, is in this form:

And the said A. B. for himself, his heirs, executors, and administrators, doth hereby covenant and agree with the said C. D. his heirs and assigns, in manner following; that is to say, that he the said A. B. &c.

But, in its application to practice, it admits of great variations.

1st, The persons by whom the covenant is to be entered into, must be directed by the intention of the parties. The object is, to obtain as much security as possible, for the performance of the act intended to be done. This is more especially the case, when the fine is to be a future act; for instance, to be levied by infants when adult; or to be levied under some other like circumstances. It is of less consequence when the fine is, in point of fact, to be levied instantly, and the covenant is a matter of form, rather than of substance; and the party retains, as in prudence he ought to do, his purchase money, or other consideration, till the fine is levied. It is also of very little consequence when the fine is to be a voluntary act, proceeding from the party by way of settlement, with a view to a family arrangement, and merely nominal damages could be recovered for a breach of the covenant; and of still less consequence is the form of the covenant when a fine is to be levied, merely to gain

the fee, to a person who has an estate tail. In those instances, however, in which the covenant is a material and essential part of the security, care is to be taken, that no person is pledged to do more than that for which he means to stipulate. Want of caution, in this respect, may subject a party to an action for damages, contrary to the intention, if that intention had been fully considered and clearly expressed. Several sellers, who are owners of distinct shares, or are joint-tenants or coparceners, ought not, except under special contracts, dictated by peculiar circumstances, to covenant for more than their respective shares; nor ought tenant for life to covenant for more than his life-interest; nor a tenant in remainder or reversion to covenant for more than that interest which shall be conferred by his estate; and the covenant of each should therefore be several, and qualified to the acts of himself and his heirs, and confined to his share, and also to his estate and interest in the parcels; and a husband, intitled in right of his wife, should covenant only as to the acts and deeds of himself and his wife, and her heirs; and each of several husbands should have his covenant qualified in like manner, to the acts of himself and his wife, and his and her heirs, and confined to the share of his wife. And these covenants should be in these or the like forms, varying them as the

circumstances require — And each of them the said A. B. and C. D. severally, separate and apart from the other of them, doth hereby for himself, his heirs, executors and administrators, and as, to, and concerning only the acts, deeds, and defaults of himself and his heirs, covenant with, &c. that they the said A. B. and C. D. respectively, or their respective heirs, shall or will, &c.

And the said A. B. doth hereby for himself his heirs, executors, and administrators, and as, to, and concerning only the acts, deeds, and defaults of himself and his heirs: and the said C. D. doth hereby for himself, his heirs, executors, and administrators, and as, to, and concerning only the acts, deeds, and defaults of himself and his heirs, and of the said E. his wife, covenant with the said G. H. and his heirs, that they the said A. B. or his heirs, and C. D. or his heirs, and also the said E. D. (she hereby consenting) shall or will, &c.

And each of them the said A. B. C. D. and E. F. severally, separate and apart from the others of them, doth hereby for himself and herself respectively, and his and her respective heirs, executors, and administrators, and as, to, and concerning only the acts, deeds, and defaults of himself and herself respectively, and his and her respective heirs: And each of them the said G. H.

I. K. and L. M. severally, separate, and apart from the others of them, doth hereby for himself respectively, and his respective heirs, executors, and administrators, and as, to, and concerning only the acts, deeds, and defaults of himself and his said wife respectively, and his and her heirs, covenant, declare, and agree to and with the said N. O. and their heirs, that each of them the said A. B. C. D. and E. F. respectively, or his respective heirs; and each of them the said G. H. I. K. and L. M. respectively, and his respective wife, she hereby consenting; and his and her heirs shall or will, &c.

In this and like assurances it is very common, and warranted by books of practice, for a husband to covenant for *himself and his wife*, and his and her heirs, that he and his wife, and their heirs, will levy the fine, &c. This is an inaccurate form, because no action can be framed consistently with the language of the covenant. Besides, this form confounds the lien part, with the stipulating part, or substance, of the covenant. The husband may covenant that he and his wife, and his and her heirs, shall levy a fine. This is a formal covenant. It expresses the intention of the parties in a manner consonant with the rules of law: but though the husband covenants for himself and his wife, that he and his wife shall levy a fine, the wife cannot be subjected to an action upon

his covenant; and it follows, that it is inaccurate, and confounds all legal distinction, to express the covenant in a form that cannot be made available. It is rather singular, that a practice so void of principle, should have been adopted so extensively as this has been. When it is deemed proper that the consent of the wife to join in the fine shall appear in the deed of uses, this consent is expressed, either in the introductory part of the husband's covenant, or in the body of the covenant itself. In one form, the husband will, with the privity, consent, and approbation of the said his wife, testified by her executing these presents, for himself, his heirs, executors, &c. covenant, &c. that &c.—In the other form, the husband for himself, his heirs, &c. will covenant with, &c. that he and his wife *(she hereby consenting)* shall and will, &c. The object of this consent is, to create an equity against the wife; but no case warrants an opinion that the wife can be bound by this consent.—The utmost a court of equity has ever done, is to bring the husband into contempt, for want of a specific performance of the covenant; and thus enforcing a fine from the husband and wife, by strict measures against the husband. The cases on this point are, *Barrington* v. *Horne*,(x) *Ortred* or *Outram* v.

(x) 5 Vin. Abr. 547. pl. 45.

Round,(*y*) *Hall* v. *Hardy*,(*z*) *Winter* v. *Devereux*,(*a*) *Sedgwick* v. *Hargrave*,(*b*) *Stephenson* v. *Morris*,(*c*) and *Withers* v. *Pinchard*, cited in the last case.

They were considered in the late case of *Emery* v. *Wase*, (*d*) and the observations made on them by Lord Eldon were, that "by this appeal I am called upon to reverse "a judgment that appears to have been "made upon great consideration. Certainly "the general point is of great importance: "whether the contract of the husband, "which however this was not intended to "be, but that of the daughters, is to be "executed against the husband by a court "of equity; in effect, compelling the husband to compel his wife to levy a fine, "which is a voluntary act. This is brought "forward in the report as the principal "ground of the decree. The argument "shews, that point is not quite so well settled "as it has been understood to be. The policy of the law is, that a wife is not to part "with her property, but by her own spontaneous and free will. If this was perfectly *res integra*, I should hesitate long

(*y*) 4 Vin. Abr. 203.
(*z*) 3 P. Williams, 187.
(*a*) Note to 3 P. Wms. 189.
(*b*) 2 Ves. 57.
(*c*) 7 Ves. Jun. 474.
(*d*) 5 Ves. Jun. 846. 8 Ves. Jun. 505.

" before I should say, the husband is to be " understood to have gained her consent, " and the presumption is to be made, that " he obtained it before the bargain, to avoid " all the fraud that may be afterwards prac- " tised to procure it. I should have hesi- " tated long in following up that presump- " tion, rather than the principle of the po- " licy of the law; for, if a man chooses to " contract for the estate of a married wo- " man, or an estate subject to dower, he " knows the property is hers altogether, or " to a given extent. The purchaser is bound " to regard the policy of the law; and what " right has he to complain, if she, who, ac- " cording to law, cannot part with her pro- " perty but by her own free will, expressed " at the time of that act of record, takes " advantage of the *locus pœnitentiæ;* and " why is he not to take his chance of da- " mages against the husband?

" If the cases have determined this ques- " tion so, that no consideration of the ab- " surdity that must arise, and the almost " ridiculous state in which this court must " in many instances be placed, can prevail " against their authority, it must be so. " For the sake of illustration, suppose 10,000*l.* " 3 per cents. carried to the account of a " married woman, and the husband con- " tracts to transfer (taking it, that the court " had jurisdiction to decree performance of

" such a contract). At the hearing, what is " to be done for the wife? In the two last " cases, the wife appears to have been left " a party to the suit, without affecting her " under the decree. If the court cannot by " the decree order any act to be done by " her, the bill ought to be dismissed against " her, unless some future act by her, to be " ordered upon farther directions, is looked " to. But the principle of the decree shews, " that cannot be the purpose. It does not " rest there. Suppose the husband procures " her consent, even by the mildest means; " persuades and influences her by the diffi- " culties he has got into, on entering into an " improper contract; and she is examined " here by the judge, who has made the de- " cree upon the husband: and if upon the " submission of all the considerations which " ought to be submitted to her in this court, " and the court of common pleas, she says " she thinks it in her situation not fit for " her to part with the property, the court " must send the husband to gaol; telling " her, she never ought to relieve him from " that state: and all this for the benefit of " a person, who cannot have a specific per- " formance certainly, but who may have " damages, and who sets up his title to a " specific performance in opposition to the " policy of the law. Upon the first ground, " therefore, there is difficulty enough to

"make me pause, before I should follow "the two last authorities; and I am not sure "whether it is not proper to have the judg- "ment of the House of Lords, to determine "which of these decisions ought to bind us. "As to the expression used by Lord *Cowper*, "that this jurisdiction is to be very spar- "ingly exercised, certainly it is very dissa- "tisfactory to be informed, that it is, and it "is not, to be done."

And in another part of the judgment his Lordship said, "If the law is, that the hus- "band signing will authorize and require "the court to call upon him to procure her "to join, his signature would do just as "well as hers; unless it is to be implied, "that the daughters were actually to sign "it. But that would be a great deal too "nice; for their mere signature could not "be a circumstance operative as evidence of "the contract."

And his Lordship added, "If the court "will bind the husband, to procure his "wife's consent, Lord *Cowper*'s declaration "is authority for saying, I ought not to "make that decree, where I am not com- "pletely satisfied by the evidence, that the "price has been as deliberately fixed, at "least, as it ought to be in the ordinary "case in a transaction between persons "dealing prudently and deliberately in esti- "mating a matter of so much consequence."

From the forms in the *Appendix*, as well as from the decided cases, it will be a necessary inference, that a person may be made a party to the covenant, to stipulate for the acts of himself and his heirs, or for the acts of a stranger, or some person with whom he is connected, or some person in whose concerns he takes an interest. The estates of infants, or their rights and titles, are frequently the subject of contract; and fines will be necessary to be levied by them, when they are adult, to complete the title, by reason of coverture or intails; and, on these occasions, some friend is generally found to covenant respecting the acts to be done by the infants or their heirs. The other instances in which such covenants are entered into, are, for the most part, relating to lunatic or other incapacitated persons, and persons who are absent beyond seas. On the one hand, the person who is to enter into the covenant, is to be careful he does not take on himself more responsibility than he intends; on the other hand, the purchaser, or person to be benefited by the covenant, must take care that he has stipulations for all those acts necessary to perfect the title. The nature and circumstances of the title must be fully considered, and the stipulations of the covenant must be extended to all those persons who may be interested, and who, in order to

complete the title, must be parties to the fine.

2dly. *Of the persons with whom the covenant is to be entered into.*—All that is necessary on this point is, that there shall be a covenantee, in whose name an action may be brought, in default of performance of the covenant. In general, the covenant is with the purchaser, if any, or with the releasee to uses, or with the trustees to whom the conveyance is made. The covenant may with propriety be to several and *their heirs*, notwithstanding the rule, that on a fine to be levied to two, the acknowledgment of right ought to be to them and the heirs of one of them, naming that person.(*e*) The covenant should not, however, be entered into by a husband with his wife. On account of the legal unity of their persons, she is not capable of a covenant or grant, proceeding from her husband. There is no well-founded objection against naming a married woman as the *covenantee*, where the covenant is entered into by any other person than the husband. Except in particular cases, the covenant should be entered into, so as to be annexed to the estate, if any, conveyed by the deed, in the lands of which the fine is to be levied.

(*e*) See 1 Vol. p. 237.

3dly. *The covenant should name the person by whom the fine is to be levied.*—The intention of the parties, and the nature of the contract between them, must dictate the language of the covenant in this particular. The object of covenant, is to secure a performance of the act intended to be done, or a compensation in damages for a breach on non-performance of the covenant. It is from the covenant alone that the intention of the parties can be collected; and it is on the terms of the covenant, and acts done, or omitted, in contravention of the covenant, that an action must be framed. Thus, suppose A. and B. are to levy a fine, and A. alone is named in the covenant, and B. is omitted, no action can be maintained for the refusal of B. to join in levying the fine. The persons to be named may be either covenantors, or other persons for whose acts they stipulate. When it may be necessary to complete the title, that a particular person, or in case of the death of that person, his or her heir at law, shall join in levying the fine, the covenant should extend to the heirs by that name; and it is prudent at least, though not perhaps absolutely necessary, that the "*issue*" *or heirs of the body*, should be named in the covenant, in those instances in which an intail is to be barred. In short, the covenant should embrace, either by spe-

cial or general words, all persons whose concurrence may be necessary; and with this view, the state of the title, and the acts necessary to complete it, should be fully considered. It is with reference only to the circumstances of the title that the covenant can be framed with accuracy.

4thly. *The time within which the fine is to be levied*, should also be defined by the deed, and, if circumstances will admit, the fine should be acknowledged immediately, or at the same time, at which the deed is executed. In most instances, the covenant is to levy the fine, as of the preceding or before the end of the next term. In case the fine is an essential part of a conveyance by a married woman, it is rarely prudent to suffer the interval till the next term to elapse; and the same observation equally applies to a fine by tenant in tail. Many accidents may happen to disappoint the expectations of the parties. The wife may refuse at a future period, or she may survive her husband, and afterwards refuse; or she may die in his life-time, and leave an heir not bound by the covenant, and whose interest it will be to frustrate the intention of the parties: and tenant in tail may die, leaving issue, and such issue may refuse to complete the conveyance. The issue are not

bound to perform the covenants or articles of the tenant in tail. *(f)* Of course the covenant allows of too much latitude when it runs in this form, viz. the said or their heirs, shall or will, in or as of term now last past, or in or as of some subsequent term, acknowledge and levy the fine, &c. A covenant in this form can never be broken during the life of the persons by whom the fine is to be levied, since they have the period of their lives for the performance of the covenant, at least unless hastened by request; and, as the cases admit of some doubt, what acts may be done by the party, in performance of his covenant, at any time during his life, and what acts may be hastened by request, the covenant, when allowing a latitude of this description for levying the fine, should have the language proper to hasten the fine by request. The covenant would then be to this effect: That the said or their heirs shall or will, in or as of term last past, or of term now next ensuing, or in or as of any other subsequent term, when thereunto required by the said or his heirs, acknowledge and levy, &c. These observations are more peculiarly relevant to transactions of purchases, settlements, &c. In mere voluntary acts, as in settlements to

(f) Ross v. Ross, 1 Ch. Cas. 171. Jenkins v. Komys, 1 Lev. 237. Weale v. Lower, 1 Eq. A. 266.

be made by a fine by husband and wife of the lands of the wife, the form of the covenant, in this particular, is of no material consequence, since it never can be expected to be the subject of an action for damages; and, from choice, it is more advisable to leave the time, within which the fine is to be levied, open to the discretion of the parties. So in those cases in which there is no intention of levying the fine immediately, but the covenant is taken merely with the view of securing the right to have a fine, if a fine shall be deemed advisable, the time of levying the fine ought, in strict propriety, to be governed by the request of the covenantee. Also, when the stipulation is, that the fine shall be levied by persons who are infants, or by persons who may be interested, but who are not precisely ascertained, the circumstances of the case must govern the form of the ~~conveyance~~ covenant.

5thly. *To whom the fine shall be levied.*— With a view to an action for damages, the covenant should stipulate that the fine shall be levied, either to particular persons, or, as the intention may require, to persons to be named, or designated by request. In technical propriety, the fine, when levied to two, should be to them and the heirs of one of them. With a view to a case thus circumstanced, the general form of covenants is to

acknowledge and levy a fine to the said A. B. and C. D. and their heirs, or the heirs of one of them. The more correct form is to covenant to levy the fine, to the two and the heirs of A. B., or to the heirs of one of them, generally without ascertaining the person to whom the inheritance is to be granted. The intention may also call for other forms in this part of the covenant. Each species of fine, and, in particular, the fine *sur concessit* for years requires some variations to adapt the covenant to the nature of the fine, and these variations should keep in view the form of the fine to be levied, so as to prescribe with precision the acts which may be necessary to be done, and secure the right of having them observed. It must not, however, be forgotten, that, with a view to the operation of a fine by way of nonclaim, the fine should be levied by or to a person who has an estate of freehold. It is not necessary, as some have imagined,(*g*) that the conusor or conusee shall have the *immediate freehold.* It is sufficient that he has an *estate of freehold,* in reversion or remainder. This may be collected from those authorities,(*h*) in which it has been decided, that a fine levied by a person seised of an

(*g*) Rowe *v.* Power, 1 New Rep. 32.
(*h*) Co. Litt. 298. a. Carhampton *v.* Carhampton, Irish T. Rep. 567. Jenk. Cent. 254.

estate in remainder or reversion, may operate to bar the title of a stranger, even for the benefit of the tenants of a prior estate, connected, in privity of estate, with the person by whom the fine is levied. These observations are intended to support the authority of *Anne Twist's* case,(*i*) though the decision in that case was lately questioned. (*k*)

In *Anne Twist's* case, one seised of lands in fee, married a wife, and after made a lease of this land to A. for life, the remainder to B. in fee; and B. levied a fine with proclamations, and the husband died; and the wife did not make her claim, &c. within five years after the death of her husband; thereby she was barred of her dower for ever, notwithstanding the estate for life in A.; but if the remainder of B. had been put to a *right*, *at* the time of the fine levied, she might have avoided the fine by plea, *quod partes finis nihil habuerunt*, &c.

The ground of *Anne Twist's* case is, that the widow had merely a right or title of dower; that this right or title was to be enforced against A. during the continuance of his estate, and, after the determination of that estate, against B. The fine levied by B. was sufficient to protect his estate against

(*i*) Shep. T. 28. Hob. 265.
(*k*) 1 New Rep. 37.

all rights and titles not enforced in due time; and the prior tenant for life may take the benefit of the fine, as the more effectual means of protecting the title of B. who claims under the same title as A. and in opposition to the widow. The principles of this doctrine are in *Co. Litt.* 298, a. in which this passage will be found:—"By this some "have gathered, that if a disseisor make a "lease for life, reserving the reversion to "himself, and the disseisee confirmeth the "state of the disseisor, that he may enter "upon the lessee, because the estate of him "in the reversion dependeth not upon the "state for life, as the remainder: but all is "one; for by the confirmation made to him "in the reversion, all the right of him that "confirmeth is gone, as well as when he "maketh it to him in remainder; and he "cannot, by his entry, avoid the estate of "the lessee for life; but he must avoid the "state of the lessor, which against his own "confirmation he cannot do; and it hath "been adjudged, that if a disseisor make a "lease for life, and after levy a fine of the "*reversion* with proclamations, and the five "years pass, so as the disseisee is for the re-"version barred, he shall not enter upon the "lessee for life."

From this passage it will be collected, that a fine may operate by way of non-claim, though it is levied by a person who has not

the immediate freehold, but merely an estate of freehold in reversion, expectant on an estate of freehold in another person. This point is fully treated of in the former volume, in the chapter on Fines.

6thly. *The covenant ought also to stipulate in what court the fine shall be levied.* — It is necessary to the validity of a fine, that it shall be levied in a court having jurisdiction. The greater part of the lands in the kingdom, lie within the jurisdiction of the courts at Westminster; and as to many lands, the courts at Westminster and the inferior courts have a concurrent jurisdiction; and a fine, as a conveyance, may be levied in either court with equal effect; except that fines, in *inferior courts*, cannot, unless there is an act of parliament for the purpose, be levied with proclamations, so as to bar the issue in tail, or confirm a title by non-claim. Lands in *ancient demesne* are within the jurisdiction of the courts of Westminster; but to levy a fine of lands in ancient demesne in the courts of Westminster, is a deceit on the lord, and he may reverse the fine by writ of disceit. Till the fine is avoided, it remains in force, and governs the title. When avoided by the lord, it is said to be avoided as between the parties. If levied with proclamations, it will bar the issue in tail, or may gain a title by non-claim; and yet a

fine levied in the courts of ancient demesne cannot be proclaimed, without a custom for that purpose, and consequently can neither bar the issue in tail, or give any security to the title by way of nonclaim. It is said, however, that, under a custom, a fine with proclamations may bar an intail of lands in ancient demesne. (*l*) When there is an intail of lands held in ancient demesne, a customary recovery should be suffered in the lord's court. By this assurance, the intail and the remainders expectant thereon, may be barred. Even without a custom, a fine in the lord's court will have every operation of a fine at the common law: it may discontinue an estate-tail, although it cannot bar it. (*m*) Titles depending on fines levied in the courts at Westminster, of lands in *ancient demesne*, generally become involved in great confusion. As the law on this subject is interesting, and not collected in any particular work, it may be acceptable to state some points on this subject, and to suggest some of those difficulties which arise in practice.

1st, The fine, while it remains in force, is good as between the parties, and will operate as against all persons claiming under the

(*l*) Dyer, 373. Lord Coke treated the custom as void. 4 Inst. 270.

(*m*) Hunt *v.* Bourne, 1 Salk. 240. 1 Vol. p.

conusor; (*n*) and, even though this is doubtful, the issue in tail; with the exception of the lord of the manor, by reason of his right to avoid the fine, as *a disceit* against him.

2dly, Though the fine first levied can never become a bar to the right of the lord to avoid that fine by disceit, a subsequent fine may operate by way of nonclaim, and bar to the remedy of the lord.(*o*) The first fine is injurious to the lord; but, upon the technical rule, that *non potest adduci exceptio ejusdem rei cujus petitur dissolutio,(p)* this fine can never operate to bar the lord. The same objection does not hold against a second fine: (*q*) and, when the lord is barred of his remedy by writ of disceit, the lands will, it is apprehended, though with some doubt, become positively and absolutely frank-fee.

3dly, When the lord avoids the fine by *disceit*, and the lands are restored to the tenure of ancient demesne, the fine, as a fine, is, as to the lands of the tenure of ancient demesne, and these lands only, (*r*) actually avoided, as between the parties, and all persons claiming under them;(*s*) and, in conse-

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(*n*) 1 R. Abr. 326. l. 42.
(*o*) 2 Inst.
(*p*) Bac. Maxims. Regula. Plow. Com. 370.
(*q*) 2 Inst. 519. Plow. Com. 370. in Marg. T. Raym. 462.
(*r*) 1 R. A. 327. l. 16. 25.
(*s*) 4 Inst. 270. Com. Dig. Anc. Dem.

quence, there is not any change of tenant; but a confirmation or release will preserve the right of the tenant.(*t*) By means of a fine, the lands become frank-fee, so long as the fine remains in force. The regular mode of avoiding the fine, and restoring the land to the jurisdiction of the lord in ancient demesne, is to prosecute a writ of disceit. It often happens, that after a fine has been levied, and before it has been actually avoided by writ of disceit, the parties levy fines or suffer recoveries in the court of ancient demesne; and it becomes a question whether these acts are not to be considered as *coram non judice*, by reason of the former fine, and that the lands are frank-fee for the time.

This question involves some nicety; nor can the law on this point be clearly collected from the books. In one case,(*u*) it seems to have been supposed, that the lands might remain ancient demesne, as against persons claiming under a paramount title, although they were frank-fee as between the parties, and even against the lord. But in *Kitchen*,(*x*) a recovery suffered in the court of ancient demesne, while the lands were frank-fee, is treated as *coram non judice*; and the case in

(*t*) F. N. B. 98. A.
(*u*) 50 E. 3. 10. 25. 50 E. 3. 24. b, 1 R. A. 326.
(*x*) On Jurisdict. p.

which the parties sued in ancient demesne, while a disseisin was in force, seems to have been in the instance of a disseisin by the lord.(y) So if fines are levied or recoveries suffered in the courts of Westminster-hall, during the time the lands are held as frank-fee, it is difficult to comprehend how these assurances will be binding on the title, in the event that the original fine shall be avoided, and the lands restored to the tenure of ancient demesne. The lord cannot be bound by the acts of his tenant, except by a fine and non-claim. It has sometimes been supposed, that a writ of disceit is in the nature of a writ of error, and limited by the statute-law(z) to twenty years. That statute, however, does not seem to apply to any errors, except those of form. From the preamble, it is nearly evident that the statute does not extend to the want of right to levy the fine or suffer the recovery, or the want of jurisdiction in the court to entertain the fine or recovery.

If it were quite certain, as the better opinion seems te be,(a) that persons having paramount titles could not sue in the courts of ancient demesne, while the lands remained of the tenure of frank-fee, it would be clear

(y) 1 R. A. 325. l. 5.
(z) 10 & 11 W. 3. c. 14.
(a) F. N. B. 98, a. Salk. 57. 1 R. A. Ant. Dem. 7.

that a release or confirmation by the lord, having the fee-simple, or any other act which puts an end to the right of avoiding the fine or recovery by writ of *disceit*, would make the lands completely frank-fee, (*b*) and the title free from all objection, except as against the claims of all those who had any subsisting titles; and they must sue in the superior courts, instead of suing in the courts of ancient demesne, for establishing these titles. This will make the theory consistent. It seems a solecism in law, that the lands shall remain, as of the tenure of ancient demesne, as against persons having *paramount* titles, while they are frank-fee as against the lord, to whom alone the fine or recovery is supposed, by law, to be an injury. These observations, however, are not intended to deny that lands may become frank-fee for a time, as by a fine, for life; a release of the seignory, by a person who is tenant for life, or by a confirmation for life. In all these and the like instances,(*c*) it is reasonable, and quite consistent with principle, that the lands should be considered as of the tenure of ancient demesne, when the act by which they were made frank-fee, for a time, ceases to have operation. It will easily be ima-

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(*b*) Salk. 57. and F. N. B. 98.
(*c*) 1 R. A. 325, 326. Kit. Jurisd. 97, b. 1 R. Abr. 325. l. 42.

gined, that, during the interval, the title will be involved in considerable difficulty, rendering it extremely doubtful to ascertain in what court; *viz.* the court of ancient demesne or the superior court; those assurances by which the title is to be regulated, as fines and recoveries, ought to be transacted. The sole object of these observations is to suggest caution, and stimulate inquiry;—with very little confidence, that the observations which are submitted to the reader, can be implicitly or safely relied on.

The law on titles involving these circumstances requires a very careful and minute investigation. Lands within the *counties palatine*, and also lands in *Wales*, are within peculiar and exclusive jurisdictions. The fine must be levied in the courts having jurisdiction over those lands. There is no concurrent jurisdiction in the courts at Westminster; and a fine levied in the court of common pleas at Westminster, of lands in one of these peculiar and exclusive jurisdictions, is considered as *coram non judice*, and is *actually void*, and not merely voidable. *(d)*

The covenant should also stipulate, upon whose request, and at whose cost and charges, the fine is to be levied. This stipulation must vary with the circumstances.

(*d*) 2 Inst. 557, 4 Inst. 205.

The request ought, for the most part, to proceed from the persons interested in having the fine levied, or by those who are named as trustees to protect the interest of other persons. The necessity, also, of expressing any request, is superseded in those instances, in which the time is fixed within which the fine shall be levied. Other variations take place respecting the costs. As often as a fine is necessary to complete the title of a vendor, or discharge the incumbrance of dower, the general practice is to have the fine levied at the costs of the seller; but if such fine is merely by way of caution, rather than necessity, it ought, in good reason, to be at the expence of the purchaser or person by whom it is required. When a husband and wife levy a fine, to convey the estate, or to bar the claim, of the wife, with a view to any arrangement for the benefit of the husband, or any family arrangement, it is of course that the fine shall be levied at the expence of the husband. Tenants in common, coparceners, joint-tenants, and other persons having partial interests, do, for the most part, contribute towards the expence of a fine, in the proportions in which they are interested. The reasonable practice is, to adapt the regulation so as to take the expence out of the fund. It is by no means unusual to make tenants in common and other part-

owners contribute in equal shares towards the expence of a fine, although their shares are very unequal. In short, the expression of the deed must vary with the intention of the parties; and it follows, that the intention must be consulted before it can be expressed.

8thly. *As to the parcels.*—The fine ought, either in terms or by reference, to specify, or at least comprise, the parcels of which the fine is to be levied. Sometimes the parcels are described in a former part of the instrument, as is the case when the instrument contains a conveyance of the lands; or the parcels are introduced by way of recital. In that case, words of reference to the parcels are sufficient. These words may be more or less specific, according to the circumstances. Nothing more is necessary, than to express the intention of the parties clearly and distinctly, so as to leave no doubt of the intention. When all the parcels are to be included, the reference may be general, in these or the like terms, *viz.*

All the messuages, &c. hereby released or otherwise assured, or intended so to be.

Should the intention require a selection or specification, the words proper for that purpose must be introduced, and some prominent and distinguishing circumstance should be fixed on. The following forms will sug-

gest the variations which generally occur in this part of the deed, *viz.*

The said messuage, &c. hereinbefore described, to be called ; or

The said messuage, &c. hereinbefore in part described to be situate in the parish of ; or

The said hereinbefore described to be in the tenure or occupation of ; or

The undivided moiety or half part, late of the said A. B. of and in the messuages, &c. hereby released, &c.; or

Of and in the messuage, &c. hereinbefore described, to be called, &c.

These examples, which admit of infinite variety, will sufficiently call the attention to the point material to be observed in this part of the deed. As often as the deed is inpendent of any other conveyance than the intended fine, the parcels are to be described fully in the covenant, or in some other part of the instrument; or at least they are to be described by such general and comprehensive terms, as will have the twofold object of embracing the parcels of which the fine is to be levied, and excluding all other parcels not intended to pass by the fine. The advantage of a full description is great, and very sensibly felt, as often as it may be necessary, on account of any omission of parcels in the fine, to move the court, in which

the fine is levied, for an amendment in regard to the parcels. There is also the advantage, common to all other transactions, that the certainty of the parcels will wholly, or in a great measure, appear from the internal evidence of the deed, without reference to the other deeds, which eventually may be lost; or to extraneous evidence, which it may be difficult to procure. The general rule respecting parcels seems to be, to preserve the same description, as near as may be, through successive deeds; to make no variation in them, except in cases which necessarily, by reason of some division or change in the nature of the property, or the like circumstances, call for such variation. On this subject, the observations most material to be regarded in practice, will be introduced in the chapter treating of Releases. No one, except those that are in the habit of perusing a great number of abstracts, can easily judge of the inconveniencies which arise from frequent changes in the description of the parcels. As connected with this subject, it is also to be noticed, that the covenant either enumerates the names by which the parcels are to be described in the fine, as by the name of 10 messuages, &c.; generally adding (by way of taking off the materiality of any error in this particular) the clause, "by such other name and names, "&c.;" or the covenant merely refers to the

general mode, in which the parcels shall be comprised, without descending to enumeration. The latter mode gives least trouble in practice; and the only preference due to the former mode is, that it fully declares the intention of the parties, by ascertaining the denomination under which the parcels are to pass, and bringing the case within those decisions, by which it has been held, that the parcels may pass by any denomination given to them by the parties.(*e*)

The covenant also expresses, that the fine is to be with *proclamations*. This is done without any regard to the circumstance, whether the proclamations are material to the object of the parties in levying the fine. It arises from the practice, that most fines are now levied with proclamations, without considering whether the proclamations are necessary or may eventually be of any advantage. The omission of this part of the covenant would not be deemed of any importance, except in those cases in which the sole use of a covenant is to afford the right to specific relief in equity, or to damages in an action at law, for a breach of the covenant. In many instances, the covenant is rather form than substance. It is of the latter description only, when it may be necessary to resort

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(*e*) See 1 Vol. p. 237.

to the covenant as the means of affording a compensation in damages for a breach in the observance of it; and the covenant should be prepared with this view in all those cases in which any other person than the covenantor is interested in having a performance of it. The exceptions only are in those instances, in which the fine is acknowledged at the same time that the covenant is executed; and the material part of the intention is accomplished by this more effectual part of the assurance.

Of the Declaration of Uses.

A well prepared declaration, will be in this form, or to this effect, namely,—

And it is hereby granted, declared, and agreed by and between all the said parties to these presents, as far as they are interested in the premises, and they hereby severally and respectively direct and appoint, that the fine or fines to be so as aforesaid, or in any other manner, or at any other time or times, acknowledged and levied; and also, all and every fine and fines, common recovery and recoveries, and other assurances whatsoever, at any time or times heretofore, and to be at any time and from time to time hereafter, acknowledged, levied, suffered, made, and executed of the said , hereby or intended so to be, or any of them, or any part or parcel of the same, either alone or jointly with any other lands, tenements, or hereditaments whatsoever, by or between the said parties to these presents, or any of them, either alone or jointly and together with any other person or persons whomsoever, or to which they, or any or either of them, is or are, or shall or may be, parties or privies, or a party or a privy, shall be and

enure, and shall be construed, adjudged, expounded, decreed, and taken to be and enure, and the same is and are, and was and were meant and intended, and is and are hereby directed and declared to be and enure; and that the person or persons to whom the said fine or fines, common recovery or recoveries, and other assurances respectively, have and hath been and shall or may be levied, suffered, made, and executed, shall stand and be seised, as to, for, and concerning the said hereby and every part and parcel of the same, with their and every of their rights, members, and appurtenances, to the use, &c.

This declaration embraces various objects:

1st, It expresses by whom the declaration is made.

2dly, The fines or other assurances of which the uses are to be directed by the declaration.

3dly, The parcels to which alone the declaration applies.

1st. It is highly proper that the declaration should express the parties between whom it is made; and the attention is to be directed to the object, that the declaration shall be the language of all persons con-

cerned in interest, and who have a right to direct the uses of the fine.

These and the following observations will be found equally relevant to the declaration of the uses of a fine, and the declaration of the uses of a recovery.

In *Nightingale* v. *Ferrers*, (*n*) "Robert, "Earl Ferrers, being seised for his life only "of his family estates, with remainder to "his first, &c. sons in tail male successively, "had several sons, the first of whom, named "Robert, was an infant of about seventeen. "A very advantageous match being agreed "upon, betwixt the eldest son and the only "daughter of Sir Humphry Ferrers, articles "were entered into, dated the 26th of Sep- "tember, 1688; and the Lord Ferrers and "his eldest son Robert were parties to, and "sealed the said articles, whereby the Lord "Ferrers covenanted, that he and his said "eldest son should, within a year after the "son should come of age, by fine or reco- "very, or such other good conveyances or "assurances as the lady's counsel should ad- "vise, convey and settle the bulk of the "family estate to certain uses, &c.

"The marriage took effect, and the infant "eldest son, having thus, during his infancy, "sealed this deed, together with his father,

(*n*) 3 P. Wms. 206.

" afterwards came of age, and pursuant to " the covenant, within the year after com- " ing of age, *viz.* in Michaelmas term then " next following, joined with his father in " levying a fine and suffering a recovery; " but there was no deed, after the most dili- " gent search, to be found, for leading the " uses of this fine and recovery. Afterwards " the Lord Ferrers revoked the uses of all " the premises limited to his younger sons " and their issue, except as to the manors of " Astwell and Falcott. Robert Shirley, the " eldest son, soon after died, as did also his " said wife, leaving issue only one daughter, " who was afterwards married to the Earl of " Northampton. And the late Earl Ferrers, " and also the sons who were elder than " the present Earl Ferrers, (who had been " found a lunatic,) were dead without issue " male.

" This matter was formerly stirred before " the Lord *King*, who was of opinion, that " the said articles could be intended as pre- " paratory only to something further, and " would not, of themselves, amount to a " declaration of the uses. But now coming " again before his *Honor*, he observed, " Though slight words will declare the use " of a fine, &c. yet here are *no words at all* " used by the infant son, who did, it is true, " join with his father in executing the arti- " cles, but it was the *Lord Ferrers*, the fa-

"ther only, who covenanted, that he and "his son would levy the fine, and suffer the "recovery to these uses. The most then "that can be made of this case is, that here "a fine and recovery by the father and son, "the one tenant for life, the other remain-"der-man in tail; and the uses are declared "by the father, the tenant for life only, "which can in no way affect the uses of the "remainder in tail. Neither can it be rea-"sonable to interpret the son's sealing a "deed (so blind and uncertain in its nature) "to devest such infant son of the inherit-"ance of this great estate, and to make him "but tenant for life thereof. The case put, "of an infant's affirming a lease for years, "made during his infancy, by acceptance of "the rent after he comes of age, is not si-"milar; because there the rent is in lieu of "the profits of the land; whereas in the "principal case no rent was reserved, nor "any inheritance given to the son in return "for the inheritance of this great estate, "which the other side would construe him "out of. Besides, this is a stale point, "given up by Earl Washington, the present "Earl's elder brother, who gave the Earl "and Countess of Northampton 15,000*l.* to "join in a fine and recovery, to re-settle the "whole family estate, which accordingly has "been done in a solemn manner, and some "provision (though a small one) has been

"made for the unfortunate present Earl, the "lunatic. Wherefore the Master of the "Rolls, agreeably to the opinion of Lord "*King*, disallowed and overruled this claim, "as likely to put the lunatic Earl to an "unprofitable expence, and an unsuccessful "suit."

Whether a like case would receive a like decision at this day, may be doubted. It will be sufficient, however, that the intention of the parties to declare the uses, shall appear; and it may be done by an agreement less formal than the precedent given in this work. Even an instrument in the *form of a conveyance* may amount to a declaration of the uses of a fine; and therefore, if husband and wife levy a fine, and afterwards make a conveyance, this conveyance, though not good, of itself, as a conveyance by the wife, may operate as a declaration of the uses of the fine, so as to be binding on her and her heirs. So the declaration in favour of the conusee may be without deed as well as by deed; but uses, unless in favour of some other person than the conusee in the fine, or resulting by the operation of law, cannot be declared without a writing.

The cases cited in the former volume(o) will also shew, that when several persons,

(o) 1 Vol. p. 311. Roe v. Popham, Doug. p. 25.

having distinct estates, levy a fine or suffer a common recovery, and the uses are declared by some only of these persons, the use will result to those owners who do not join in the declaration, according to their former estates. To these observations it is to be added, that if A. and B. being successively tenants in tail, join in suffering a common recovery, A. alone may declare the use; and in the absence of declaration by him, the use will result to him in fee-simple. But when two persons so circumstanced join in levying a fine, each must declare the use *pro interesse suo*, or in default of declaration the use of his estate will result to him.

It has already been noticed, that the uses of a fine already levied cannot be declared by any other means than *a deed*. Such is the express enactment of the statute of 4 & 5 Anne, c. 16.

2dly, It will be sufficient to direct or declare the uses of the particular fine, levied or to be levied; but experience and the information derived from the decided cases, have dictated the caution, that the declaration shall extend to all other fines, &c. levied and to be levied, &c. as well as the particular fine levied or to be levied, of which uses are to be declared. Hence the form is adapted to bring within its scope every fine, recovery, or other assurance, levied or to be levied, &c. of which the uses

are or shall be in an executory state, so as to be reached by this declaration. And when the decisions shall be attentively examined, its utility will be discovered, since every assurance in which any of the parties are or may be interested, so as to give them a right to direct or controul the uses, are within the influence of the language of this form; and the form which appears in its language to be tautologous, will be found, in all its parts, to proceed from decided cases, so that each part has a distinct object.

It is readily conceded, that some parts of this form may be safely omitted. The like observation will apply to almost every other form in general use; but the importance of adhering to correct forms, which clearly and obviously express the intention, and render it free from all ambiguity and nicety of criticism, will reconcile a prudent practitioner to its adoption, except in particular cases, in which it is the first object to keep the expence within as narrow bounds as possible.

3dly, *Of the parcels.*—Sometimes all the parcels comprized or to be comprized in the fine, at other times part only of these parcels, are to be the subject of the declaration. Of course, when part only of the parcels are to be comprized, restrictive words must be used, that the declaration may not

extend to more parcels than those intended to pass. Also, as often as the general form extends to all fines levied of those lands of which the fine is intended to be levied, and also to fines which may comprize those and other lands, it is highly expedient that the restrictive clause should be added. That clause is introduced by the words, "as to, "for, and concerning," &c.; and there are few instances in which this clause can be safely dispensed with.

Besides this restrictive clause, other clauses of distribution of the parcels may be requisite. This is particularly the case when different uses are to be declared of different undivided shares; or different uses are to be declared of distinct parcels. These and the like circumstances render the repetition of the restrictive clause, "as to, for, and con- "cerning," extremely convenient: and to make the clause run easy, it assumes the following form:—"Shall be and enure, &c. "as to, for, and concerning, &c. the mes- "suage, &c. hereby released, &c. to the "uses upon the trusts, &c. hereinafter li- "mited, expressed, and declared, of and "concerning the same, (that is to say) as "to, for, and concerning ALL that close, "&c. called , or as to, for, and "concerning one undivided third part or "share," &c. In those instances in which expence is an object, the declaration may

assume a more concise form, and be to this effect, *viz.* "And it is hereby directed, de- "clared, and agreed, by and between the "parties to these presents, that after the "fine or fines, hereby agreed to be levied, "shall be levied as aforesaid, or in any "other manner, the same fine or fines, and "all recoveries suffered and to be suffered "of the said &c. hereinbefore "mentioned and intended to be hereby re- "leased, or any of them, either alone or "jointly with any other lands and heredi- "taments, shall, as to and concerning the "&c. hereby released, with "the appurtenances, operate and enure to "the use," &c.

The uses themselves must in all cases vary with the intention of the parties, and they may be either general, or very special, according to the intention.

On the rule, that an *use cannot be declared on an use, so as to be executed into estate by the statute of uses,* the common error of declaring that the fine shall enure to the use of the conusee and his heirs, "to the "uses hereinafter limited," &c. should be carefully avoided, whenever the intention requires that the uses shall be executed into estate by the statute. Under a declaration framed in this manner, the use in favour of the conusee will, *cæteris paribus,* be executed by the statute, and the ulterior uses will be

uses in the second degree, and for that reason mere trusts.(*p*) But if the use in favour of the conusee shall be omitted, the other uses will be uses in the first degree, and they will be transferred by the statute of uses into estates, that is, supposing the legal estate of freehold to pass by the fine; for the statute cannot execute any uses declared on an equitable seisin, although such uses may, by analogy, govern the equitable ownership; nor can any uses, to be executed by the statute, be declared of those estates, though passing by fine or any other assurance, which are mere chattel interests, and consequently do not transfer a seisin. Uses may be declared of a fine *sur concessit* passing an estate for lives; but no uses can be declared with effect, so as to be legal estates of a fine *sur concessit* for years.

It has often happened, that a conveyance has been made by lease and release, or other grant, to A. B. and his heirs, to uses, in such manner, that the uses may be executed by the statute, and a fine has been covenanted to be levied, and the declaration has been, that the fine shall enure to the use of the conusee, (being the releasee, grantee, or feoffee,) and his heirs, "to the "uses hereinbefore limited," &c. Doubts

(*p*) Lady Whetstone *v.* Athury, 2 P. W. 146. Robinson *v.* Comyns, Cas. Talb. 164. Hopkins *v.* Hopkins, 1 Atk. 581.

have been entertained, whether, under these circumstances, the legal estate will vest, by means of the statute of uses, in the releasee, or feoffee, as the *cestui que* use of the fine; or will be governed by the uses declared of the release. The declaration of the use in favour of the conusee of the fine is evidently a mistake; and as the fine is for further assurance only, and is an accessional and not the sole operative part of the conveyance, so that the estate passes immediately by the operation of the release or other grant, and the uses arise from the seisin conveyed by the release or grant, and are not suspended until the fine is levied, there appear to be strong and cogent reasons for rejecting the use declared of the fine, so as to leave the release or grant, and the declaration of the uses of the same, in full force; and to treat the fine merely as a further assurance, confirming the release or grant, and the title and uses depending on the same.

In this view of the operation of the several assurances, the uses can never arise upon the fine, to vary or controul the uses declared upon the release or grant. To the declaration of the uses of the fine, it is sometimes expedient to add a further declaration of the particular object for which the fine is levied. This is more especially the case, when one of the objects is to bar an at-

tendant term outstanding in a trustee. As it depends on the intention of the parties whether the fine shall, or shall not, be deemed to operate, by way of nonclaim, against the trustee of the term, it follows, as a measure of proper caution, that the intention to bar the term should be declared in all those cases in which a fine is levied with a view that it shall have this operation.

On Leases.

A Lease, at the common law, is that species of assurance, by which a person who has the fee-simple, or a particular estate, either in tail, for life, or years, creates a term for *years*, or *at will*, or if he has an estate of freehold, then for a *life* or *lives*, out of that estate, *reserving a reversion to himself*. Hence the difference between an *under-lease* and an *assignment*. At one period it was supposed, that the mere reservation of rent, or of a right of entry by a termor, in an instrument importing to be an under-lease, but in point of fact comprising all the estate of the owner, was an under-lease: in short, that it was a lease as between these parties. But it is now settled, that though the instrument imports to be a lease, yet, if it does, in effect, comprise *all the estate* which resides in the grantor, it amounts to an *assignment*, and is not an under-lease; and a right of entry, or reservation of rent, will not change the nature of the estate. (*q*) And, on the other hand, if it leaves any portion of the estate in the lessor, even a day, or an hour, or a minute, as a reversion, it is an underlease, and therefore

(*q*) Palmer *v.* Edwards, Doug. 187.

an instrument purporting to be an assignment for the residue of a term, reserving the last day or hour, will operate as a lease of this description.

In order that an instrument may operate as an underlease, a reversion must be retained by the former owner, and consequently the underlease must be for a period, less, in point of time, than the term or estate of the lessor; or, when the grant is for the residue of the term of the grantor, there must be an exception of the last day, or the last hour, or of some other period of the term. This exception, as well as a grant made for *part* only of the period, during which the estate of the grantor is to continue, will leave a reversion in the grantor. It is material that the instrument shall reserve the last portion of the estate; for an instrument may, it should seem, operate as an assignment, notwithstanding it reserves a portion of the estate, being the first part of it, as in the case of an assignment to hold from a day that is to come, or from an event to happen, (*r*) unless it is to happen after the death of a person by express limitation. (*s*) It is to be observed also, that this doctrine of underleases applies only when per-

(*r*) Shep. Touch.
(*s*) Jermin *v.* Orchard, Show. Par. Cas. 199.

sons, having particular estates, create interests derived out of their particular estates. After the underlease is made by a termor for years, the grantor has, in point of estate, not merely and simply the residue of the time of his original term; he has the same measure of time, duration of interest, and estate, as he had prior to the underlease; subject only to that lease. The sole effect of the underlease, is to confer a right to the possession, or other beneficial enjoyment, during the term granted by the underlease; and the lessor in the underlease retains, by way of seignory or reversion, his original ownership, subject only to the right conferred by the underlease.

These observations are material, with a view to the important doctrine of merger and surrenders; for, on the merger or surrender of the interest taken by the underlease, the lessor in the underlease, or his assignees or representatives, will have the same degree of ownership and right of enjoyment, as if no underlease had been made. And this reversion in the lessor, though it may be merely nominal, will be an interposed estate, and will prevent the application of the doctrine of surrender or merger, as between the estate of the underlessee, and the estate of any other person than the owner of this reversion, or interposed estate.

The doctrine is also material, with reference to the learning of estates, which may be enlarged by release; and to the remedies by action of covenant, which run with the estate; and to conditions in restraint of assignment, but not extending to underleases; for an underlease will not be a breach of a condition, to avoid the lease on assignment: (*s*) nor can the lessor in the original lease maintain debt or covenant against an underlessee, though he might have maintained these remedies in case there had been an assignment instead of an underlease. (*t*)

Underleases afford great facility in rendering titles under attendant terms extremely simple, instead of being very complex. Any number of terms may be assigned to one and the same trustee, for the several residues of several terms, except the last hour of each term. On account of the reversion remaining in each assignor, each term will remain a subsisting interest, without the least danger of merger. The only objection to this mode is, that a captious and unwilling purchaser may contend that each of the former trustees retains a portion of the legal estate, and he may require the estate of each trustee to be assigned for his benefit. Whether this ob-

(*s*) Kennersley v. Orpe, Dougl. 56. 57. 184.
(*t*) Holford v. Hatch, Dougl. 183.

jection will prevail in a Court of Equity, remains to be decided; and of course the practice cannot be adopted with perfect safety, except in those instances which render it impossible, with any convenience or even certainty, to make a distinct assignment of each term to a distinct trustee; or to assign every alternate term, namely, the first, third, and fifth terms, to one trustee, and each of the intermediate terms, *viz.* the second, fourth, and sixth terms, to another trustee. In the instance in which this practice of underleases was adopted with great success, the deed was in general terms, amounting to an underlease by all trustees, by whom it should be executed, without knowing who those trustees were, or in what right or in what character they were entitled. The deed was therefore adapted to the state of the title, whatever might be the circumstances or right of the persons by whom it should be executed. The material part of this deed, relevant to the point under consideration, will be found in the Appendix. The draft ultimately received the sanction of some of the most eminent conveyancers, and has since been followed, in some instances, for the convenience of having all the terms in one trustee, instead of having different trustees for different terms.

In *Scott* v. *Fenhoulet*,*(u)* the Chancellor seems to have decided, that an underlease purchased by the reversioner, who was the owner of the inheritance, but leaving an interposed beneficial interest in some other person, will not become attendant on the inheritance, by the implication of a court of equity; but he distinctly admitted, that the term, comprised in such underlease, might be made attendant by an express declaration. In creating several underleases out of several terms for years, no objection can be made, that the terms are not attendant, when the precaution is taken, of having an express declaration, that the terms shall be attendant; and this is a precaution not likely to be omitted in a case of this nature, which necessarily calls for attention to the object to be accomplished, and one of these objects is to make the terms attendant on the inheritance.

In abstracts of title, it frequently happens that there are two terms for years, one derived out of the other; as a term of 900 years carved out of a term of 1000 years. It is important to have it understood, that the term of 900 years is the estate which confers the right to the immediate possession; and it may be safe to dispense with

(*u*) 1 Bro. Ch. Cas. p. 69.

an assignment of the term of 1000 years, even when it would be the height of imprudence to suffer the term of 900 years to remain outstanding. It is also material, that the term for 900 years may be merged in the term of 1000 years, or may be surrendered to the person who is the owner of that term: but the term of 1000 years can never merge in the term of 900 years; because a more remote estate can never merge in a prior and more immediate estate. For the same reason, the owner of the term for 1000 years cannot make an actual surrender to the owner of the term for 900 years. The character of *lord* exists in the owner of the term for 1000 years, and the termor of 900 years is a *tenant* to him. Other circumstances, deducible from the same principles, will be found in the chapter on *Lease* and *Release;* and it will appear, that the term of 1000 years may be enlarged by release from the owner of the inheritance, but the term of 900 years cannot be enlarged while the term of 1000 years is subsisting; and it will subsist till it is forfeited, surrendered, or an end is put to it by some other means.

At the common law, no man could grant a lease, to continue beyond the period at which his own estate was to determine; for the rule of that law is, "*cessante statu primitivo, cessat derivativus:*" so that whenever the estate of the lessor determines, it involves

with it the determination of the estate of the lessee. But leases made under powers, owe their effect to the power under which they are created, and not merely and simply to the estate of the lessor; and a lease made under a power may continue, notwithstanding the determination of the estate of the person by whom the power is exercised.

In the instance of leases by tenant in tail, there is one peculiarity. Originally the estate of the lessee is determinable on the failure of the issue inheritable to the estate tail; but when a common recovery is duly suffered by the tenant in tail, the estate tail is enlarged into a fee-simple, and the term, instead of being determinable on the failure of the issue inheritable to the estate tail, will become absolute.(*x*) In strictness, the lessee has originally, with a view to the legal effect of his lease, a term of years subject only to a collateral quality, under which it may expire by the determination of the estate out of which it is derived. It is inaccurate to treat these terms as being for a given number of years, if the tenant in tail shall so long live, and the heirs of his body shall so long continue. Terms granted by tenant in tail should be created, and assigned as absolute interests, without any collateral

(*x*) Dyer, 81, b. in Marg. Bac. Abr. Leases, D.

determination; but in the covenants for title, such exceptions should be made, or qualifications added, as will confine the warranty of title to the peculiar nature of this interest.

While mention is made of leases by tenant in tail, it will be proper to notice, that by the statute *de donis conditionalibus*, leases granted by tenant in tail for years or for lives, are (as far as they are independent of the influence of common recoveries, and also of the statutes of proclamations onfines, and the enabling statute of the 32d H. the 8th, c. 28. and powers in settlements) voidable by the issue, and not actually void. They consequently admit of affirmance by the acceptance of rent, or by any other act which recognizes the existence of the lease, after the death of tenant in tail. Such leases, however, are invariably good as against the tenant in tail himself and his alienee, and even a husband tenant by the curtesy, or wife, tenant in dower. (*y*) A distinction also is taken between those leases of tenant in tail, which are to commence, or which by any possibility may commence, in his life, and those leases which, by the very terms of the limitation, are to commence after his death.

(*y*) Dyer, 46, b. 2 Bendl, 65. Bedford's Cas. Rep. 70. Bac. Abr. Leases, D.

Leases of the former description are voidable only, and not void; while those of the latter description are actually and originally void,(z) at least as against the issue.

It is also agreed, that leases voidable by the issue in tail, cannot be avoided by his alienee, with the exception, that the books treat the alienee as having the right to avoid a lease, which is to commence in possession, after the completion of the title of the alience.

The books (a) also seem to say, that a lease to commence on a *future day*, and which would be voidable by the issue in tail, may be avoided by the alienee of tenant in tail, who is the grantor, when the lease is to commence in possession, after the title of the alienee is complete: but this is a position not easily reconcileable with first principles.

It is also worthy of observation, that if tenant for life leases for an hundred years absolutely, and the estate of the lessee is confirmed by the reversioner, the lessee will have an absolute instead of a determinable interest: (b) his lease will be derived out of the estate for life, while that estate continues, and will be binding on the estate of

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(z) Dyer, 279. pl. 7. Griffin v. Stanhope, Cro. J. 455. Machell v. Clarke, 2 Lord Raym. 778.
(a) Bacon's Abr. Leases, D.
(b) Co. Litt. 45, a.

the reversioner, whenever that estate commences in possession. When it is propounded, that derivative terms will cease with the determination of the estate out of which they are derived, this must be understood of their absolute determination, by effluxion of time or a collateral determination, as in the instance of a lease to A. for ninety-nine years, *if he shall so long live*; or by a condition annexed by the parties to the original estate; for neither the merger, surrender, or forfeiture of the particular estate, will induce the determination of the estate granted by the underlease. It is also worthy of observation, that when the particular estate is defeated, by merger, surrender, or forfeiture, the privity of estate between the lessor and the lessee in the underlease, is determined; and the remedy for rents and for breaches of covenant, no longer continues. (*c*) The lessor in the underlease cannot have these remedies, because they were annexed to a reversion which no longer continues; and they cannot be claimed by the person who had the reversion expectant on the estate of the lessor in the underlease, because there is no privity of estate between this reversioner and the original lessee. These observations must be understood as relevant to the com-

(*c*) Webb *v.* Russell, 3 Term Rep. 393. Moore Rep. 94.

mon law. In particular instances of renewals, the inconvenience has been remedied by the legislature. (*d*)

Leases are of two sorts:

1st, Leases which depend on the ownership of the lessor:

2dly, Leases which depend, either in the whole or in part, on a power residing in that person; and leases of the latter description owe their effect, as far as respects those in remainder, &c. to the power under which they are created; and they are created by means of powers in acts of parliament, conveyances to uses, or authorities in wills.

In general, leases derived under powers are good as against the party himself, his heirs or issue, and those in remainder or reversion; but a power may be penned specially, and may make a lease under the power, binding on the party, and his heirs or issue, without affecting those in reversion or remainder. An instance occurs, under the enabling statute of the 32d H. 8th, c. 28. Leases made in pursuance of that statute, by tenant in tail, are good as against the tenant in tail and his issue, and are void as against those in reversion or remainder, (*e*) supposing them to be different persons from the tenant in tail. And therefore, a lease

(*d*) 4 Geo. 2. c. 28, s. 6.
(*e*) Co. Litt. 44. a.

granted by tenant in tail, in pursuance of the provisions of the statute of 32d H. 8th, c. 28, will, as against those in reversion or remainder, determine when the estate tail shall determine; and the estate tail, unless enlarged into a fee-simple by a common recovery, will determine on the failure of the issue inheritable to the estate tail.

Leases are again distinguished into leases which *pass an interest*, and leases which operate by *estoppel*. Leases of the former description are supplied from the ownership of the lessor. Those of the latter description are made by persons who have *no interest* at the time, at least no *vested* estate, but are to operate on their ownership, when they shall acquire the same.

Thus, if an *heir-apparent*, or a person having a *contingent remainder*, or an interest under an *executory devise*, or who has no title whatever at the time, makes a lease by *indenture*, or by a *fine sur concessit*, and afterwards an estate vests in him, this indenture, or fine, will operate by way of estoppel, to entitle the lessee to hold the lands for the term granted to him; and this estoppel, when it becomes efficient, and can operate on the interest, will be fed by the interest; and the lease will be deemed as a lease derived out of an actual ownership. *(f)* And

(*f*) Weale and Lower, Pollexf. 54. Co. Litt. 47, 277, a. Bac. Abr. Leases, O.

there are many cases, in which it is prudent to make such a demise, to the intent that the same may bind the title by way of estoppel, though it cannot operate as a lease of a present interest.

It has frequently occurred, that, in cases of this sort, a fine *sur conuzance de droit come ceo*, &c. or other fine, importing a grant of the fee, and not a fine *sur concessit* for years, has been levied. This practice is pregnant with mischief, because the operation of a fine, purporting to grant the fee, will be to extinguish the right to any future estate, instead of binding the title to that estate by estoppel.(*g*)

The late case of *Roe* ex dem. *Bulkley* v. *Archbishop of York*,(*h*) calls for some observation. According to the established doctrine, every lease for years which cannot operate upon the ownership, may, if made by indenture, or by fine *sur concessit* for years, operate by way of estoppel; and no lease that can operate by way of passing *an interest*, will operate by way of estoppel: (*i*) and whoever has a term for years, or even an estate for life, and accepts a new lease, incompatible with the interest granted by the former lease, abandons the interest un-

(*g*) Buckler's Case, 2 Co. 55. Weale v. Lower, Pollexf. 54.
(*h*) 6 East, 86.
(*i*) Co. Litt. 47, b.

der the former lease; (*k*) and this acceptance of the new lease is a virtual surrender of the former lease, and is called a *surrender in law*. In the cited case, there was a lessee and a reversioner, and the reversioner had an estate for life, with a power of leasing under certain restrictions: and the reversioner, "for and in consideration of the surrender of a former lease, and by virtue "and in execution of the power therein referred to, or any other power in the lessor, "or in anywise enabling her," demised to the lessee for a term of years, at a yearly rent, &c. And the lessee accepted this lease: and it was decided, that the acceptance of this new lease was not a virtual surrender of the former lease. The alledged groundis, that the lease was intended to be made by virtue only of the power; and as the power was not pursued, the new lease did not work an extinguishment of the interest of the former lease; for the parties have declared, most clearly and unequivocally, that the new lease should take effect by authority of the power. The argument supposed, that the second lease being void under the power, would operate under the interest of the lessor; so that the acceptance of this new lease was a virtual surrender of the term under

(*k*) Ive's Case, 5 Co. 11.

the former lease: but Lord *Ellenborough* observed, "whether or not this lease will "operate, as between the parties, by "estoppel, is not material for the present "purpose to enquire. It is sufficient to war- "rant us in deciding for the defendant, if it "did not pass an interest, which we are of "opinion it did not." It is to be lamented, that the question of estoppel was suffered by the court to remain in doubt. From all the text books, it will appear, that no lease can operate by way of estoppel, when it may operate by way of interest, although it cannot operate to the full extent of the intention of the parties. If the second lease had any operation whatever, it must have been to pass an estate for the term of years determinable on the death of the tenant for life. This lease must have been derived out of her estate, and not have been binding on her merely as an estoppel, since there was an estate to support the lease to this extent; and to admit that the second lease operated in any manner, either by way of interest, or by way of estoppel, is to bring the case within the authorities which decide, that by the acceptance of a new lease, there is a virtual surrender of the former lease. An estoppel, it is well known, must be mutual, binding on both parties, or on neither: and the lessee could never contend, contrary to the estoppel, that no term passed to him by the

second lease. The estoppel precludes his right to deny the operation of the second lease. To support the case, then, of *Roe* ex dem. *Bulkley* v. *Archbishop of York*, it seems necessary to conclude, that that case turns on the point, that the lease was intended to operate under the power; that as it could not operate under the power, it did not operate on the estate; and for that reason the second lease was absolutely void, and had no operation whatever by way of estoppel, or as passing an interest. In practice, it is prudent to follow this case, with the precaution, whenever a renewal is taken by virtue of a power, to add a few negative words, to shew that the new lease is to operate by virtue of the power only, and not of the estate, or interest of the party by whom the power is to be exercised. Such clause may be to this effect:—

"*And the said by virtue and in* "*pursuance and exercise of the power or au-* "*thority in that behalf contained in the will* "*of the said and as far, as he is* "*authorized or enabled by that power, but no* "*further or in any other manner, doth* direct, "limit, and appoint;" or "doth by way of "demise or lease, direct, limit, and appoint," &c.

These words will clearly exclude all intention that the instrument shall operate as a demise under the ownership or estate of

the lessor, and will enable the court to decide on the construction of the lease, solely with reference to the power, independent of the question, whether the lease does not necessarily operate by virtue of the estate, since it cannot operate by virtue of the power. A clause in this form would enable the court, with great propriety, and in strict conformity to the decided cases, to determine, that as the lease cannot operate according to the language and intention of the parties, it shall have no operation whatever; since if it were to operate in any other manner, such operation would be contrary to the intention. These observations also shew, that the case of *Roe* ex dem. *Bulkley v. Archbishop of York*, is free from all difficulty, if the decision turned solely on the ground, that the lease was intended to be a lease by virtue of the power, and that it neither had, or was intended to have, any operation by way of estoppel, or in point of interest, so that it was originally and in the first instance merely and simply void.

When an estate for years is derived out of several interests, as a lease by A. and B. when A. is tenant for life, and B. has the remainder in fee, it is originally the lease of A. and the confirmation of B. (*l*) On the

(*l*) Treport's Case, 6 Co. 14.

death of A. it will be deemed in law the lease of B. and the confirmation of A. So, if a lease for years is granted by tenant for life, this lease in its creation is determinable on the death of tenant for life; but a confirmation of this lease by the owner of the inheritance, at any subsequent period, and during the life of A. will render the estate absolute, and it will continue as well after the death, as during the life of A.; but during the life of A. the privity will be between A. and the lessee only. The relation of *landlord and tenant*, and of *tenant and reversioner*, will subsist between them alone; but on the death of A. the tenant will become the lessee of the person to whom the confirmation is granted: hence the distinction, that during the life of A. the estate of the lessee cannot be enlarged, by a grant from any other person than A.; but, after the death of A. the estate of the tenant may be enlarged by a release from the person by whom his term was confirmed, or any person who is the owner of the estate of the party confirming.

A lease for years, which is merely a contract for the possession, may be *in esse* for a time, and cease for a time; therefore, if tenant in tail makes a lease for years, and dies, leaving a widow who is dowable, and issue in tail, the lease will be good against the issue, though avoided by the wife; or if

avoided by the issue, it will be good against the wife.(*m*)

The language of the court, in the *Earl of Bedford*'s case,(*n*) is,—"Sir Thomas Wyatt, "by indenture, demised the manor of Aus- "tine for twenty-six years, rendering 13*l.* "rent to the said Sir Thomas and his heirs; "and afterwards Sir Thomas died, and all "this was found by office. And Sir Thomas "Wyatt was his son and heir male, of full "age, by which the king had *primer* seisin "of the land itself, and for his interest did "avoid the lease; and afterwards Sir Tho- "mas the son sued livery, and accepted of "the rent of Austine, and afterwards com- "mitted high treason, for which he was at- "tainted. In that case it was adjudged, "that forasmuch as the king had avoided "the lease but as to his *primer* seisin, that "after livery made, it is in the election and "power of the issue in tail, by acceptance "of the rent, to affirm the lease, because the "lease was avoided by the king but for "part of the term. So if tenant in tail "takes a wife, and makes a lease for thirty "or forty, &c. years, rendering rent which is "avoidable by the issue in tail, and dies, "and afterwards the wife recovers her dower, "in that case the wife shall avoid the lease;

(*m*) Bedford's Case, 7 Co. 72.
(*n*) 7 Co. 72.

" and yet, if she dies within the term, the " issue in tail at his election may either " affirm or disaffirm the lease. And it was " said, if tenant in tail makes a lease for " thirty or forty years, rendering rent, which " is avoidable by the issue in tail, and after- " wards tenant in tail dies without issue, his " wife with child with a son, by which the " donor enters, and as to him avoids the " lease; and afterwards the son is born; the " lessee re-enters, the son at his full age may, " by acceptance of the rent, affirm the lease; " for the lease was never avoided absolutely, " nor *simpliciter*, but *secundum quid;* and " upon the matter *ex post facto*, was defeated " but for a time."

To these observations it is to be added, that a lease avoided by the issue in tail, is void as against each successive issue in tail; and a lease avoided by the *successor* of a corporate body, under any of the disabling statutes, will be void as against the successor for the time being: so that there is a material difference between the avoidance by a person in respect of a *partial interest* or *particular estate*, and by the owner of the entire interest, as the issue in tail.

Again, Leases are distinguished into—

1st, Leases of the possession;

2dly, Leases of the reversion;

3dly, Leases by way of reversionary interest,

Leases of the first description, are to confer a present right of present enjoyment, at least by the intention of the parties; but a lease at the common law, of lands in possession, passes no estate till entry. In the meantime, the lessee has no term or estate; he has merely an *interesse termini*. (*o*) This *interesse termini* may be assigned, (*p*) even without deed, (*q*) or released, but it cannot be surrendered, nor does it, while executory, admit of enlargement by release. (*r*) Though, at the common law, a lessee had no term until actual entry, a bargainee of the use for years, has an actual estate, on the execution of the bargain and sale; and this is the reason, as will appear in a subsequent chapter, that the estate of a bargainee for years may be enlarged by release, without an actual entry. (*s*) For the same reason it may be surrendered.

2dly, Leases of *the reversion*, are leases granted by a person who has a reversion, and they pass a portion of that reversion as a *vested interest*. They confer a right to the reserved rent and services, and create the relation of *landlord and tenant* between the

(*o*) Co. Litt. 46. b. 270. a.
(*p*) Co. Litt. 47. b. 338. b.
(*q*) Co. Litt. 85. a. Plow. Com. 150.
(*r*) Co. Litt. 270. a.
(*s*) Barker *v.* Keate, 2 Mod. 249. Mallorie's Ca. 5 Co. 113.

first lessee and the second lessee. Such leases of a part of the reversion cannot be granted without deed; nor, while attornment was a ceremony in the law of tenures, could any estate have vested in the second lessee, without attornment by the person whose attornment the law had required, to the validity of grants of the reversion.

3dly, A *Reversionary Lease*, is a lease to commence on a future day, or on an event, and is to operate in the mean time by way or in the nature of an *interesse termini*. It may be granted with or without deed; and it will be good, though granted without deed, by a person who has merely a reversion or remainder: but when granted without deed, it never can confer a right to the possession, till the possession *is vacant*; nor can it confer a right to the rents or services in the mean time. On this subject, some further observations will be found in a subsequent part of this chapter.

Of the means by which Leases may be created.

Leases, with the exception of leases at will, are either for *years* or for *life*, and the assurance must be adapted to the nature of the interest to be created.

To leases for a life or lives, unless they are created under a power, or are of a reversion

or remainder, or a thing lying in grant, there must be livery of seisin, or a lease and release, which are equivalent to livery.

But leases for lives under powers may be created in the mode prescribed by the power, without any livery of seisin, &c. (*t*) and it is more proper that they should be created without livery of seisin than with it: and leases for lives of things lying in grant, or of a reversion, or remainder, cannot be created without deed.

Leases for years may be created either by deed or without deed, according to the circumstances of the case, with the exception, that leases of *incorporeal* hereditaments must universally be created by *deed*. Even of *tithes*, separate and a part from the *rectory*, there cannot be a lease for years without deed: but a contract for *retainer* of tithes by the owner may be good without deed. This contract is to be used as an agreement, and not as a grant or lease; though the tithes, separately, cannot be leased without deed; a *rectory* may be so leased, and the tithes may pass as parcel of the rectory. (*u*)

Leases made in pursuance of a power, must pursue the circumstances required by the power; and for that reason they must

(*t*) Wilson *v.* Garrett, 2 Lev. 149. 1 Vent. 291.
(*u*) Shep. Touch. 209, 229. Reynoldson *v.* Blake, 1 Lord Raym. 193.

be made by deed, by indenture, or the like, so as to conform to the requisites of the power.

Leases depending for effect on the ownership of the lessor, must be made either by deed or without deed, according to the circumstances of his estate; for if the lessor has an estate in reversion, the lease cannot be granted *of the reversion* without deed. So if he has an *incorporeal* hereditament, he cannot grant a lease of such hereditament without deed; nor can a term, when created in an incorporeal hereditament, be transferred without deed. (*x*)

But if he has an estate in possession in corporeal hereditaments, the lease may be good without deed, though, in practice, it is usual, and certainly advisable, to make the lease by deed, and to have the deed indented, that it may operate as an estoppel. At the common law, a person so circumstanced might have made a lease merely by parol, without writing. Now, by the statute of frauds and perjuries, (*y*) a writing is required to the validity of all leases, except those for a term not exceeding three years, and on which two-thirds of the yearly value shall be reserved.

(*x*) Co. Litt. 85 (a).
(*y*) 29 Car. 2. c. 3.

The books all agree, that a person who has a reversion or remainder in corporeal hereditaments, may make a lease for years, to operate by way of *interesse termini,* without deed: but such lease without deed cannot operate as a grant of the immediate estate, as a portion of the reversion or remainder. Great difficulty is experienced in collecting from the books, whether this *interesse termini* shall commence in possession, as an actual estate, as soon as the possession shall fall to the lessor by surrender, forfeiture, or other means, or shall operate only on the possession from the period when, by effluxion of time, the lessor is to have the possession by reason of the actual and not the accidental determination of the prior estates. In *Bacon*'s Abr. chap. Leases, under the letter N. an able discussion of this point will be found, with various distinctions between the effect of grants made, 1st, by *parol,* or; which is the same in effect for this purpose, *by mere writing*;—2dly, by deed poll;—3dly, by indenture. The conclusion to which Chief Baron *Gilbert* seems to arrive is, that a term granted by parol, by a person who has merely a remainder or reversion expectant on a term for years, will be void for such part of the time as is comprised in the former lease, and will be good for the remainder of the time. It is admitted, that the doctrine does not apply to those in-

stances, in which the prior estate is *for life*, and it follows any other estate of freehold. It is evident, also, that the Chief Baron is not perfectly consistent in all the parts of this chapter. In one instance, he treats the lease by parol as to take effect in possession, "upon the determination of the first lease, "when or which way soever that happens;" while, in a subsequent passage, he considers the second lease as incapable of effect, if the period of the first lease runs out by efluxion of time; and it is to be lamented, that the doctrine of the Chief Baron is derived from the arguments of counsel in the case of *Bracebridge* v. *Clowse*, (*z*) and not from any decision. The utmost extent of authority to be found among the cited cases, is the opinion of Mr. Justice *Gawdy*, (*a*) that "so much "of the second lease as comprises the same "term as was included in the former lease, is "void in its inception." Perhaps it may not be too much to say, that this point deserves further consideration. It is difficult to understand why this lease cannot bind the possession in the hands of a lessor, from the time the possession shall fall to him.

The great object in all leases, either for life or for years, is to fix, with certainty, the duration of interest. In leases for lives, a

(*z*) Plowd. 121.
(*a*) Cro. Eliz. 160,

life or lives, or some event connected with a life or lives, must be the measure of the interest. Even these limitations admit of a great variety, of which the following are examples :

To A. for his life;

To A. for the life of B.;

To A. for the lives of B. and C.;

To A. for the lives of himself, B. and C.;

To A. for the joint lives of himself and B.;

To A. and B. or to several persons for their joint lives;

To A. and B. for their lives;

To A. for her widowhood;

To A. while she shall remain sole;

To A. while she shall remain sole and chaste;

To A. till he shall return from Rome;

To A. till he, or some other person, shall pay a sum of money;

To A. while he shall remain a justice of the peace;

To. A. till he shall be promoted to a benefice in the church;

To A. and B. while they shall be resident in Norfolk, or shall be justices of the peace for the county of Norfolk.

In short, the form of the limitation may be varied with any circumstance connected with the life of man. This subject is fully dis-

cussed in the Essay on Estates, chap. Estates for Life. In some instances, the estate will be merely for life, notwithstanding the addition of a limitation to the heirs; as in the instance of a grant to A. and his heirs, for the lives of himself, A. and B.; or for any other period which necessarily must determine with a life or lives. In such instances, the heirs are named merely as special occupants, and the limitation to them does not create an inheritance. The reason is obvious: the interest is bounded and circumscribed by a life or lives. But in other instances, the addition of the word "heirs" will make an estate of inheritance, which, without these words, would have been merely a freehold. Thus a grant to A. till his marriage, or till his return from Rome, will be an estate for his life, determinable on the event which is expressed: but a grant to him and his heirs till his marriage, or till his return from Rome, will give an estate of inheritance determinable on that event; and in case the event shall fail, this inheritance will become an absolute fee-simple. The leading rules for discriminating an estate merely of freehold, from an estate of inheritance, when the grant contains a limitation to the heirs, will be found in that chapter of the Essay on Estates, to which reference has lately been made. A point of some dif-

ficulty (*b*) is, whether an estate for life must be measured by a life or lives actually in being at the time of the grant. It is now settled, that a gift by way of remainder or executory devise, or springing use, to a person who is unborn, for his life, is good. The only restriction is, that when a person not *in esse*, nor in *ventre sa mere*, at the death of the testator, or at the date of the deed, is made tenant for life, no limitation in favour of his issue as purchasers, will be good within the rule against perpetuities. There is one point on which there does not appear to be any decision, *viz.* whether, though a grant made to A. for his life, with remainder to his first son for life, would be good; a grant to A. for his life, and the life of his first son then unborn, will be supported according to the intention of the parties. A passage in Hawkins' Abridgment (*c*) of Coke upon Littleton, seems to question the validity of a grant in this form, *quoad* the life of the unborn son. His language is—"By a gift to A. and his heirs, his heir "can take nothing; not an inheritance, be- "cause there is no possibility of its continu- "ing for ever; not a freehold descendible, "because such must continue during lives

(*b*) Essay on Estates, p. 408.
(*c*) p. 12.

"*in esse* only, and no man can create a new "estate."

In principle, there seems no objection to such grant. The law of perpetuities cannot be adduced as an objection against a limitation in this form. Should it be said, that A. may die before the son is born, especially when the child is to be from a stranger, and not of A. himself, it may be readily admitted, that the death of A. will occasion the determination of the estate,(*d*) and that the estate will not revive on the subsequent birth of a child. But on the policy of the law, even against perpetuities, it may be easily inferred, that there cannot be an estate for the period of successive lives; as, a gift to A. for his life, remainder to his first son for life, remainder to the first son of that son for his life, and so on in succession. (*e*) Perhaps the same rule may be extended to a grant to A. for his life, and for the life of his first-born son, and for the life of the first son of that son, &c. &c.: and yet it is very difficult to find, in the books of the common law, any authority which denies the validity of such limitation; except the limitation is void, upon the ground, that a lease for life must necessarily be for the life of a person

(*d*) Poole *v.* Nedham, Yelv. 149.
(*e*) Humberston *v.* Humberston, 1 P. W. 332. 5 East, p. 198.

or persons in being at the date of the lease. Some suspicion seems to have been entertained on this point by the practitioners of more ancient times, when the rules of the common law were more simple and better understood than they are at the present day. They seem to have accomplished by indirect means, that which they could not have accomplished with certainty and confidence by more direct limitation. Instead of limiting an estate for the life of A. and his first-born son, &c. they were wont to limit an estate for years, if A. and his first-born son, &c. should so long continue. Also, though a limitation to A. and his heirs for lives, to be born in succession, may not be good, no doubt is to be entertained of the validity of a limitation to A. and his executors for a term of years, if he and the heirs of his body, or he and his heirs of a given description, shall so long continue. In deeds at the common law, it is necessary that a grant of an estate of freehold should be made to commence immediately; in other words, the freehold must not be put *in abeyance.* This rule extends to grants of lands in possession, and to grants of the reversion of lands, and also to grants of incorporeal hereditaments already created. *(f)* Grants of incorporeal

(f) Buckler's case, 2 Co. 55. Essay on Est. c. Freehold.

hereditaments, on their creation *de novo*, are not within the rule. This subject, with the reasons on which it depends, is fully discussed in the chapter on Freeholds, in the Essay on Estates: nor does the rule extend to limitations of use, either in bargains and sales, covenants to stand seised, or conveyances to uses, nor to limitations in wills. The use may be limited to commence at a day to come, or upon an event, and it will be good by way of future or springing use. So a limitation in a will may be good, though it is to commence from a future time, or upon an event. In each of these instances, all that the law requires is, that the time at, or the event upon, which the estate is to vest an interest, shall be fixed so as to happen within that period which is prescribed by the rule against perpetuities. The following examples will illustrate this doctrine; a doctrine which deserves the most minute attention, since, from its defeating the intention, it is more likely to surprize into a mistake, those who are not intimately acquainted with the rules of law governing real property.

1st, A lease to A. for a life or lives, to commence from next Michaelmas, is void; being a lease to commence in future. This case supposes livery to be made before Michaelmas day. Livery after the day, if made in person, or if made by an attorney

with sufficient authority, will support the lease; for livery to hold from a day that is past, is, in point of law, livery of the immediate freehold, and free from the objection of being a grant to commence *in future*: in other words, to place the freehold in abeyance.

2dly, A bargain and sale, or covenant to stand seised to uses, will be free from objection, although it is to give an estate of freehold, to commence at a future day, or upon an event; as a bargain and sale to A. and his heirs, To have and to hold to A. and his heirs from and after Michaelmas day now next ensuing. So in a conveyance to uses, an use may be limited to A. and his heirs, from and after a given day, or a particular event. In all these instances, A. has a future use, to be executed into estate, from and after the appointed period or designated event. In the mean time, the use will result to the bargainor, covenantor, or grantor, and the *cestui que* use will have merely an inchoate interest, and not an *estate*. The like limitation may be made by will, and be good under the learning of *executory devises*.

And these different instruments admit of a great variety of such limitations; circumscribed by no other rule, than that the limitation must be within the boundary prescribed by the doctrine against perpetuities.

It will also be collected from the chapter of Freehold, in the Essay on Estates, that this rule against the *abeyance* of the freehold, is applicable only to the first or particular estate. Remainders expectant on an estate of freehold, may be good by way of remainder, although they are limited to commence from a future time, or upon an event. Such limitations are the subject of the doctrine of contingent remainders; and provision is made against the abeyance of the freehold, by the rule of law that requires these limitations to give a vested interest during the particular estate, or, at latest, in the instant when that estate determines. Nor is this rule extended to limitations, which, though "sounding futurely," may give a present and immediate interest, as in the instance afforded in *Badger* v. *Lloyd*, (g) *Weale* v. *Lower*, (h) and *Lady Lanesborough* v. *Fox*. (i)

In regard to leases for years, the text books seem to propound the rule, that every lease for years shall have a certain commencement and a certain continuance. It is essential, that the time of duration of every lease for years shall be measured by fixed periods, as by years, months, weeks, days, hours, minutes, or the like; and it cannot be measured by indefinite

(g) Lord Raym. 523.
(h) Pollexf. 54.
(i) Cas. T. Talb. 262.

periods of time, as so many years as A. shall live, or till an event shall happen, or the like, except the event has reference to a certain period of time, as till A. shall attain his age of twenty-one years, or till 100*l.* shall be paid out of a rent affording an income of 10*l.* a year; (*k*) and though it may be referred to A. to give certainty to the duration of the lease, by naming the term, he must name the term during the lives of the lessor and lessee. (*l*)

But a lease for years may have a *collateral determination;* and that may be done indirectly, which cannot be accomplished by more direct means. For example: a lease for so many years as A. S. shall live, will not be good as a lease for years; but a lease to A. for 100 or any other number of years, if he shall so long live, will be a good lease, with a collateral determination. In the former instance, no certain limited time is fixed for the duration of the lease, while, in the latter instance, certain limits are prescribed for the duration of the interest; and the term, though determinable on the death of A. has this limitation only by way of collateral determination. When it is said, that *terminus annorum certus debet esse, et deter-*

(*k*) Bishop of Bath's Case, 6 Rep. 35.
(*l*) 1 Co. 155. 6 Co. 35.

minatus; (*m*) or in the language of Lord *Coke*, "regularly in every lease for years, "the term must have a certain beginning "and a certain end," (*n*) this is to be understood in its legal and technical sense. The only circumstance required in limitations of terms for years is, that a precise time shall be fixed for the continuance of the terms; so that when the commencement of the term is ascertained, the period of determination, by effluxion of time, may be known with certainty. In the first place, a term may be limited to commence from the date of the deed, or from a future period, or upon an event, or upon such one of several events as shall first happen, or, as the intention shall dictate, from such one of several events as shall last happen. The general forms for the commencement of a lease are, from the date; from the execution or the making of the deed; from the 25th day of March now next, or now last past, or some other fixed day now next ensuing, or which is past; from the death of A. or the death of A. without having been married, or from any other event; from the forfeiture, expiration, or other sooner determination of a subsisting term. When the

(*m*) Bracton, lib. 2. c. 9.
(*n*) Bishop of Bath's Case, 6 Co. 34, 35. Co. Litt. 45, b.

term is limited from a day that is past, it commences in *title*, only from the execution of the deed. The title cannot have retrospect. The words of reference to a time past, are merely for the purpose of *computation*, as one of the means of measuring the duration of the interest. No right to the profits for a time past can be conferred by a lease in this or any other form. In case the lands are held under a prior lease, so that the lease in question grants the immediate reversion, the rent from Lady-day past may belong to the second lessee; but his right to this rent will depend, not on the period fixed for the computation of his interest, but on the rule of law, which considers the rent to belong to the person who is the owner of the reversion on the rent-day; and treats each portion of the rent, whether it becomes due yearly, half yearly, or quarterly, as one entire demand, belonging to the person who is the reversioner on the rent-day. The continuance of the term must be measured by years, months, weeks, days, or some other period equally reducible to a certainty with years, months, weeks, days, &c.; so that the extreme bounds of the duration of the interest may be ascertained at latest, immediately after the term commences in interest. At the same time, however, that the law requires the extreme boundary to be fixed, it admits *of conditions*

to defeat, and *collateral determinations* to put an end to, these terms in the mean time, before they have filled the measure of their continuance. On these points, the more useful information, with the examples and their illustrations, will be found in the Essay on Estates, in the chapter on Estates for Years, and still more fully in Bacon's Abr. chapter Leases. It may be useful to state a few distinctions, by way of contrast between leases for years and leases for lives. Such contrasts have the evident advantage of enabling the student to form correct opinions of the law, upon points most material to be understood.

First, By the rules of the common law, an estate of freehold (except an estate of freehold in a thing created *de novo*, and in such thing only on its first creation) cannot be limited to commence at a future time, or upon an event; but a term for years may be limited to commence from a future time, or upon an event.

Secondly, An estate of freehold cannot be created without livery of seisin, of lands in possession, or without a grant, by deed, of lands in reversion: but a term for years may be created without livery, and, except in particular cases, without deed.

Thirdly, An estate of freehold once created, cannot be transferred without livery of seisin; or, being of incorporeal heredita-

ments, or of a reversion or remainder, without a grant by deed. A term for years, being merely a chattel, may, unless it is an incorporeal hereditament in its nature, as a rent, &c. and although it is a term for years in reversion or remainder, be granted from person to person without deed; but a term for years in incorporeal hereditaments, as rents, cannot, from the nature of the subject, be transferred without deed. The language of Lord *Coke* (*o*) on this point is, "Note a diversity between an original chattel, of a "thing that properly lyeth in grant, and a "chattel derived out of a freehold, of any "thing that lyeth in grant. For example: "if a man make a lease for years of a "villein, this cannot be done without deed; "neither can the lessee assign it over with"out deed, because it is derived out of a "freehold that lyeth in grant: but the wardship of the body is an original chattel during the minority derived out of no freehold; and therefore, as the law createth "it without deed, so it may be assigned "over without deed.

"A corporation aggregate of many cannot "make a lease for years without deed, in "respect of the quality of the incorporation; "but their lessee may assign it over *without* "*deed.*"(*p*)

(*o*) Co. Litt. 85, a.
(*p*) Co. Litt. 85, a.

"If an advowson be holden by knights'-
"service, and the tenant dieth, his heir
"being within age, the lord cannot grant
"the wardship of the advowson without
"deed, because it is derived out of an inhe-
"ritance that lyeth in grant, and passeth
"not by livery; for *jus præsentandi* is incor-
"porcal." (*q*)

Fourthly, At the common law, an estate of freehold cannot be limited to vest and re-vest at different times, so as to be *in esse* for a time, and suspended for a time. This rule, however, is confined to things *in esse*, and not to incorporeal hereditaments as rents, when the stipulation is annexed to them on their creation, by the terms of the original grant. (*r*) In their nature, terms for years may cease for a time, and be *in esse* for a time. (*s*) From the same rule it follows, that an estate of freehold cannot be confirmed for a time, and suffered to remain in a defective state for the residue of the time; (*t*) but a title under a term for years may be confirmed for a portion of the time, and left in *statu quo* for the remainder of the time. (*u*) On this subject Lord *Coke* has the following passages:

(*q*) Co. Litt. 85, a.
(*r*) Essay on Est. ch. Freehold.
(*s*) Earl of Bedford's Cas. 7 Rep. 70. Litt. 46, a.
(*t*) Litt. 519, 520. Co. Litt. 297, a.
(*u*) Co Litt. 297, a.

"A confirmation can make no fraction of "any estate to extend but to part of the "estate only."(x) This observation must be confined to estates which are of freehold tenure.

"If the parson makes a lease for a *hun-* "*dred* years, the patron and the ordinary "may confirm *fifty* of the years; for they "have an interest, and may charge in time "of vacation. And so if a disseisor make a "lease for a hundred years, the disseisee "may confirm *parcel of those years*, but "then it must be *by apt words*; for he must "not confirm the lease or demise, or the estate "of the lessee, for then the addition for "parcel of the term should be repugnant, "when the whole was confirmed before; "but the confirmation must be of the land "for part of the term. So may the con- "firmation be of part of the land; as, if it "be a lease of forty acres, he may confirm "twenty, &c. So if tenant for life make a "lease for a hundred years, the *lessor*," [namely, the original lessor,] "may confirm "either for *part of the term*, or for part of "the land. But an estate of freehold can- "not be confirmed for part of the estate, for "that estate is entire, and not several as "years be." *(y)*

(x) Co. Litt. 296, a.
(y) Co. Litt. 297, a.

It was a refined distinction, that a confirmation of the *term eo nomine*, or of the *estate*, precluded any qualification, aiming at a confirmation for a particular period. The old books, as is evident from the passage cited out of *Co. Litt.* treated the term as comprising all the estate; and the words which express a particular time for the duration of the confirmation, as inconsistent. In modern times, this distinction seems to have been exploded. See *Plowden* v. *Cartwright.* (*z*) On the same ground it was formerly held, that a grant of lands and *all the estate*, or of all the estate in the lands, would render an *habendum* for a *particular time* repugnant. This point was overruled in a late case, by which it is decided, that an *habendum* for a particular time will be operative, and the deed will receive the construction, that the lands, and the estate in the lands, are granted for the time expressed in the *habendum.* (*a*)

Fifthly, An estate of freehold in lands cannot be defeasanced except by a condition contained in the deed granting the lands, or in a deed executed at the same time, and forming part of the same transaction; but a term of years may be defeasanced

(*z*) 1 Burr. 282.
(*a*) Earl of Derby v. Taylor, 1 East. 502.

by a deed executed at any time after the creation of the term.

Sixthly, An estate of freehold is entire, and cannot, by the rules of the common law, be avoided, by condition, for part of the same. It must be wholly avoided, or not at all; while a term for years, which is merely a contract for the possession, may, by defeasance, be avoided, or suspended for a time, and left in force for the residue of the time.

It is also to be noted, that limitations by way of use and by executory devise, may partially defeat part of an estate of freehold previously limited.

Lastly, An estate of freehold granted by lease at the common law, cannot, by means of a condition, be made to cease, *ipso facto*, by the operation of the condition: but a condition annexed to a lease for years, that the lease shall, upon a particular event, be void, will actually defeat the estate. It follows, that an estate of freehold to which such condition is annexed, will, after the condition is broken, remain as a subsisting estate, till avoided by entry or claim, (*b*) and consequently may be confirmed or enlarged; while a term of years thus defeated by the condition, will, *ipso facto*, be avoided, and consequently cannot be enlarged, nor be

(*b*) Co. Litt. 214, b.

confirmed by express words, or acceptance of rent; (c) since a confirmation must be of an estate which is voidable or defeasible only, and not of an estate which is void. It is also to be observed, that under the learning of uses and executory devises, an estate of freehold may, by a conditional limitation, operating as a future, or springing, or shifting use, or by an executory devise, be made to cease, *ipso facto*, without entry or claim.

After these preliminary observations, it will be necessary only to consider the *formal* parts of a lease, and the cautions to be observed in preparing instruments of this description.

The parts of a lease are,

1st, Its style;
2dly, The parties;
3dly, The consideration;
4thly, The grant;
5thly, The parcels;
6thly, The exception;
7thly, The habendum;
8thly, The reservation;
9thly, The conditions; and,
10thly, The covenants.

1st. Leases are made by *indenture*, or by *deed poll*.—Indentures begin with the words,

(c) Co. Litt. 215.

This Indenture, &c.; while in deeds poll the exordium is, "Know all Men by these Pre-"sents, that I, *A. B.* in consideration of, "&c. have," &c.; or, *To all persons to whom these presents shall come, A. B. sends greeting, &c. Know ye that*, &c.

2dly, In indentures of lease, as in other deeds, the grantors—namely, lessors—on the one part, and the grantees—that is, the lessees—on the other part, should be named as the parties; and care should be taken that the lessors are competent to make a lease, either in right of some *estate*, or by virtue of some *power*.

Sometimes, as when a lease is made pursuant to a power, which requires consent, or is made by a trustee who has no right to lease without the concurrence of his *cestui que trust*, the person whose consent is so required, or the *cestui que trust*, should be also named as a party, that he may express such consent, or give his concurrence. And when different persons, having different interests, are the lessors, the number of parties will be increased. As often as the person, who is to be the immediate lessor, has merely a particular estate, or a doubtful or defeasible title, there should, if the intention requires it, be the concurrence of those persons, who may give stability and confirmation to the lease. When A. has the fee under a *defeasible* title, a lease granted by

him to B. will be subject to be avoided by the person in whom the title resides, unless that person confirms the lease. And if A. is tenant for life, with remainder to B. in fee, and a lease is made by A. alone, such lease, unless warranted by a power, will determine on the death of A. That the lease may be good against B. and his heirs, he should join in the lease. And, as already noticed, a lease made by A., tenant for life, with the confirmation of B. who has the remainder or reversion in fee,*(d)* will, during the life of A. be construed as the lease of A. and the confirmation of B.; and after the death of A. it will be construed as the lease of B. and the confirmation of A.: consequently, the rent reserved by the lease will belong to the person who is, for the time being, in the intendment of law, the leasing party. (*e*) But when A. has the fee under a defeasible title, which resides in B. and the lease is made by A. and confirmed by B., A. will at all times be deemed the lessor, and B. be deemed the confirming party; and the rent reserved by the lease, will, during the term, belong to the lessor and his representatives. It will be obvious in this place, that a confirmation will be available, though proceeding from a person who can-

(*d*) Treport's Case, 6 Rep. 16.
(*e*) Ibid.

not make a valid lease in point of interest. That a man may lease in point of interest, he must be seised, or have a *vested estate*; but the confirmation of a lease will be binding, although it proceeds from a person who has merely *a right* or *title*, and not an estate. — Under these circumstances, the confirmation operates by way of *release of right*; and the law favours releases, and confirmations which partake of the same nature.

3dly, A *consideration* is not of the essence of a lease, except in *bargains and sales*, to operate under the statute of uses; and even in assurances of that nature, the reservation of a rent will be a sufficient consideration. *(f)*

In general, a consideration will not vitiate a lease, except it is made under a power, and that power restrains the lessor from taking any fine, premium, or foregift. When such restriction is imposed on the power, then to receive any consideration will defeat the lease; and consequently, to express a consideration, is to make the lease void on the face of it, as far as depends on the power.

In all other cases, when a lease is made for a consideration, the consideration should

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(*f*) Barker v. Keate, 2 Mod. 249.

be expressed in such terms as will correctly describe it. Of course, when the consideration is a valuable one, there should be a receipt for the same. To these observations there is an exception in practice: bishops and other ecclesiastical corporations, by whom renewals are granted at the ancient rent, seldom permit the consideration of the renewal to appear on the face of their leases.

4thly, In demises at the common law, the operative words should be, "demise, grant, "and to farm let;" (*g*) and in leases to operate through the medium of the statute of uses, the operative words should, in strict propriety, though this is not absolutely necessary, be "*bargain and sell.*" (*h*)

In demises for terms of years, by way of mortgage, the operative words generally used are, "grant, bargain, sell, and demise;" and when the lease is made under a power, there should be a reference to the power, and the words of the power, as "direct, "limit, and appoint," or the like, should be used. To the words of appointment may be added, the words of the common law demise; and they may be introduced by a clause to this effect, *viz.* "And, *by way of* "*further assurance*, the said hath

(*g*) Co. Litt. 45, a.
(*h*) Butler's Co. Litt. note to p. 271, b.

"granted," &c. And in this, as in other deeds, the grantor and grantee should be named in this part of the assurance; and when there are several grantors, the clause "Have and each of them hath granted," &c. should be inserted; and when the lease is made in pursuance of a power given to two persons jointly, it is more correct to use joint words of appointment, without any words to give a distributive construction to the acts of the parties. Also, when any consent is required to the execution of a power of leasing, or trustees lease with the consent of the *cestui que* trust, such consent should be expressed in this part of the lease. And as often as any particular mode of execution and attestation is required, a reference to such mode of execution and attestation should be made in this part of the deed, and the deed should have a corresponding attestation. The attestation is essential; while the expression in the deed is formal only. The observations on this subject will be found more fully detailed in the chapter on Appointments; for all leases made in pursuance and exercise of a power of leasing, contained in a conveyance or devise to uses, are, in strictness and propriety, appointments by way of lease, and not leases or demises. The term "demise "or lease," is, in propriety, confined to leases

to operate under the rules of the common law.

A question frequently arises, on informal instruments, whether the instrument operates as a lease, or as a contract for a lease; in other words, whether it confers a legal and perfect title, or merely a right to have a specific performance of the contract, by a lease to be granted in performance of the agreement.

In *Baxter* v. *Browne*,(*i*) an agreement was with all convenient speed to grant a lease: and they (the intended lessors) did thereby set and let to him All that, &c. To hold for twenty-one years from Candlemas Day then next, at the rent of 290*l.* per annum, payable half-yearly, with a proviso, that the lease should be void on non-payment of rent, alienation, &c. and that such lease should contain usual covenants on the part of the lessors and lessee, and certain special covenants therein mentioned, in one of which the words *this demise* occurred; and it was held that this was clearly a good lease *in præsenti*, with an agreement to execute a more formal and perfect lease *in futuro*. The court observed, that the operative words *let and set*, were in the present tense; that a reference was made

(*i*) 2 Bl. Rep. 973.

to this demise. It is observable, that there had been fourteen years possession under this instrument, and the lessors of the plaintiff had accepted rent. Under such circumstances, the court observed, if the words of the lease could import an immediate legal demise, the court would support it as such.

In *Goodtitle* ex dem. *Estwick* v. *Way*, (*k*) Lord Abingdon entered into an agreement with Way, which contained these words: "The said Earl of Abingdon doth hereby "*agree to let*, and the said Richard Way "*agrees to rent* and take for the term of "seven, fourteen, or twenty-one years, in "case the said Earl shall so long live, at and "for the rent of 1400*l.* a year, to be paid "half yearly (the said Earl to pay or allow "all manner of tithes and taxes, both ordi-"nary and extraordinary), all his estate, &c. "at Rycot. It is agreed the said Richard "Way shall enter upon all the said premises "immediately, but not commence payment "of the rent until Lady-day next. It is "further agreed, that *leases with the usual* "*covenants shall be made and executed by the* "*parties on or before Michaelmas next.*" And the court were all of opinion, that this was not a lease. They said the case of *Sturgeon* v. *Painter*, (*l*) was in point. They also ob-

(*k*) 1 Term Rep. 735.
(*l*) Noy, 128.

served, that in the present case there was an express stipulation, that leases should be drawn before Michaelmas; therefore it plainly was not the intention of the parties that this agreement should operate as a lease, but only that it should give the defendant a right to immediate possession till a lease could be drawn.

In *Doe* on dem. of *Coore* v. *Clare*, (*m*) T. Tidd, who was intitled to certain copyhold messuages in reversion after an estate for life, agreed, by an instrument in writing under his hand and seal, upon an agreement stamp, that in case he should be seised of or intitled unto the said messuage, &c. on the death of Mary Slathorn, he would, immediately on her death, demise and let the same to the said T. Clare, on the terms and conditions thereinafter mentioned; and therefore the said T. Tidd did agree to demise and let unto the said T. Clare, all, &c. To hold to the said Clare from and immediately after the death of the tenant for life, for the full and whole term of twenty-one years, at a yearly rent; the first payment to be made on the first quarterly day after the death of the tenant for life: and, after several covenants on the part of Clare, Tidd covenanted, that after the death of Mary Slathorn, and his be-

(*m*) 2 Term Rep. 739. Lady Montague's Ca. Cro. Ja. 301.

coming intitled to the premises, he would *procure licence to let* the said premises, and also covenanted, that Clare should peaceably enjoy for the said term of twenty-one years; and it was held that this agreement did not amount to a lease. The court relied particularly on two circumstances: 1st. That if the agreement were held to be a lease, a forfeiture would be incurred, which was contrary to the intention of the parties, as appeared by the agreement to procure a licence: 2dly, That the stamp was conformable to the nature of an agreement for a lease, and not adapted to an absolute lease.

The result of all the cases appears to be, that the instrument will operate either as an actual lease, or as an agreement for a lease, according to the intention of the parties, as that intention can be collected from the entire instrument.

In general, an express agreement to execute a formal lease at a future day, is evidence of an intention, that the instrument shall operate as a mere executory agreement, and not as an actual lease. But when there are words of *actual demise*, in the present tense, these words will amount to an immediate lease, though they are accompanied with other words, containing an agreement for the execution of a formal lease at a future day. Under these circumstances, the words of the agreement do not controul the

operation of the words of express demise. They cannot explain words in which there is no ambiguity. But when, instead of the words "*doth demise*," &c. the words "doth "agree to demise," are used, these words may be explained and qualified by the context of the instrument.

5thly, The parcels should be fully described; at least should be described with sufficient certainty; and such exceptions should be introduced as are necessary to accomplish the intention of the parties.

In demises for long terms for years, the parcels should, in general, be taken from the last purchase deed. But in farming leases, building leases, &c. a new description is generally adopted; and in particular in farming leases, the description may be very concise, since reference to the last occupier, &c. seems the only distinguishing circumstance which is material, in addition to the name and contents of the farm, &c. Thus the description may be, "All that "called , situate in the parish of " , now or late in the tenure or oc- "cupation of , and containing by "estimation or thereabouts."

In appointments by way of demise, *under powers*, the parcels are generally introduced in the recitals, and granted with reference to the description in the recital. Circumstances, however, render even a departure

from this form convenient; and, generally speaking, it is desirable to have the description of the parcels in the operative part of the instrument.

In all demises, the general words should be introduced, and in demises or appointments for long terms of years, the clause of *all the reversion*, is usually inserted. The clause of "all the estate" should in all leases be omitted as informal.

In farming leases, &c. the clause of "all "the reversion" is also to be omitted.

But the addition of the clause of "all the "estate," though improper, is no longer so obnoxious as it was formerly considered. The only instance, in which this clause can militate against the intention of the parties, is when it is introduced into an instrument, intended to be a lease by a person who has a term for years. There are cases in the books, which would lead to the inference, that the clause, "all the estate," would pass all the interest, and consequently the whole term, of the grantor, and that a subsequent *habendum*, introduced with a view of creating a particular estate, would be repugnant and rejected. It is now decided, (*n*) and with great reason, that the express limitation in the *habendum* will qualify the words of grant

(*n*) Earl of Derby *v.* Taylor, East. 502.

in the parcels, and, on the context, the instrument will import, and be construed, to be, a demise or grant of the lands, and of all the estate therein, for the particular term; and thus the intention of the parties will be established, and the deed will operate as a demise of a portion of the estate, and not as a grant of the entire interest.

6thly, When the intention requires it, an exception should be added. The rules of law to be observed, in regard to exceptions, will be found in the chapter on Releases.

7thly, In this species of assurance also, an *habendum* is generally introduced. As in other instruments, so in this species of assurance, it is a *formal* and not a *necessary* part of the deed.

And all the observations made on the *habendum* in releases, are equally applicable to the *habendum* in a lease, except in the particulars to be collected from the observations which follow.

Frequently, it is required by powers, that the lease shall be made in possession, and not in reversion, or by way of future interest. Therefore, in executing powers, this stipulation must be observed.

So in common law, leases for lives, which pass an estate of freehold, the freehold must be granted as a present and vested interest, and not be placed in *abeyance*. But to leases for lives, made under powers, unless

the contrary is required by the power, it is no objection that the term is granted by way of future interest, since it may operate as a springing or future use.

With the exceptions which have been noticed, leases for years may be granted to take effect, either from the execution of the deed, or from a future day, or any event. In the limitation of a term for years, the continuance of the term must be definitively marked, so that the time of its continuance, or rather the precise period of its determination, may be ascertained, at latest, from the period of its commencement in interest.

On this subject, all the observations necessary to be attended to, will be found in the Essay on Estates, chap. Years, and in the preceding part of this chapter.

Sometimes, to leases for years a collateral determination is annexed. This collateral determination should be expressed in the most clear and precise terms.

The greater difficulty is experienced to express the contingency, when the estate for years is to continue in one alternative till several events shall happen, and in another alternative till one event shall happen.—Cases of this sort sometimes require nice and critical attention. The contingency should be so fully and clearly expressed, that the construction may not admit of any ambi-

guity, or be doubtful in the interpretation. Every case of this sort must depend on its own peculiar circumstances. The form may be to this effect, *viz.*

"For ninety-nine years, if A. shall so "long live, and B. his son shall be a "minor; or which shall first happen "until B. shall be married."

Sometimes the contingency may defer the operation of the collateral limitation, till the last of several events shall happen; as, "to "A. for ninety-nine years, if B. shall so long "live, or there shall be issue of his body, "or, which shall last happen, there shall be "a default on the part of C. to pay to D. "his executors, administrators, or assigns, "the sum of 1000*l.*"

These forms may be varied, so as to be increased to a number almost indefinite. Every case must depend on its own circumstances, and the intention of the parties. The more material point is to use the words "and" and "or," as conjunctives or disjunctives in their strict grammatical application; and to render their purport so clear, certain, fixed, and determined, that no question may be fairly raised on the sense in which these words are used. Expressions to this or the like effect are best adapted to remove all ground for doubt, *viz.*

"If A. shall die unmarried, and also "without issue;" or,

"If he shall die under the age of "twenty-one years, or without having "been married."

In all cases to add the words "also" or "likewise" after the word "and," will prove that word to be used as a conjunctive; and to repeat the word "if," or the words "in "case," after the word "*or*," will leave no doubt of its being used as a disjunctive.

These observations will also be found equally applicable in penning covenants, conditions, and limitations by way of executory devise.

A lease for *years*, if *A. and B. shall so long live*, will determine on the death of either of these persons; (*n*) and unless such is the intention, the clause should be expressed in these words: "If A. and B. *or* "*either of them shall so long live*;" so as to keep the term on foot until the death of the survivor of these persons.

A distinction of the same sort, but with a different conclusion, is applied to leases for lives. Thus a lease for the *lives of A. and B.* is a lease during the lives of them, and the survivor of them. (*o*) But a lease during such time as A. and B. shall be justices of the peace, is a lease only during such time

(*n*) Brudnel's Case, 5 Co. 9.
(*o*) Ibid.

as both of them shall continue in that office. (*p*) It is apprehended, a lease until A. and B. shall return from Rome, would be a lease until the return of both of them; because the return of one of them does not satisfy the words of the limitation. In short, all cases of this sort depend on the intention expressed by the words of limitation. Though the resolutions in *Brudnel's* case are considered as sound law, the reason assigned for these resolutions is not quite satisfactory.

8thly, In most leases, a rent is reserved.

The general rules are,

1st, It cannot be reserved to a stranger; and,

2dly, It may be reserved *to the heir*, &c. without being reserved to the ancestor, &c.; but the heir takes it as incident to the reversion; and, for that reason, it may be released or disposed of by the ancestor. (*q*)

The rent ought to be reserved *during the term*, unless particular circumstances require that it should be reserved only for a part of the term; for it may be reserved to commence from, and after a given time or a given event, or to cease before the end of

(*p*) Brudnel's Case, 5 Co. 9.

(*q*) Bacon's Abr. Rent. Co. Litt. 213, b. & note. Oates v. Frith, Hob. 130.

the term. With this qualification, the sure way is to reserve the rent during the term, and then it is incident to the reversion. And when the rent is reserved during the term, it will belong to the heir, executor, or assignee, who for the time being shall be owner of the reversion, notwithstanding the omission of words of reservation to the heirs. (*r*)

But unless the rent is reserved generally, without saying to whom, (*s*) or is reserved *during the term*, it cannot go to the heirs or executors unless they are named; for it will determine on the death of the lessor. (*t*) And though the rent is reserved to the *lessor and his assigns*, yet, as the assignee comes in the place of the lessor, it will determine, as to the assignee, on the death of the lessor. (*u*)

So if a man, who is seised in fee, makes a lease, and reserves a rent to himself and *his executors* generally, without saying during the term, (*x*) the executors cannot have this rent, though they are named; because they are not the representatives of the lessor *quoad* the reversion, to which this rent is an-

(*r*) Sacheverel *v.* Frogate, 2 Sand. 367. Ventr. 162. Surry *v.* Brown, Latch. 99, 100. Bac. Abr. Rent.
(*s*) Co. Litt. 47. a.
(*t*) Co. Litt. 47. 2 Roll. Abr. 450.
(*u*) Co. Litt. 47. Wooton *v.* Edwin, 12 Rep. 36.
(*x*) Richmond *v.* Butcher, 12 Co. 36. is over-ruled.

nexed, and the heirs cannot have the rent, because they are not named. (*y*)

Also, and for the same reason, *mutatis mutandis*, if a man, who has a term for years, makes an underlease, reserving rent to himself and *his heirs*, without limiting it to be during the term, neither the heirs or executors can have this rent; but as has been already noticed, (*z*) a reservation *during the term* will cure any defect in naming the representatives, and will also supply the omission to name them. (*a*)

When different rents are to be reserved for different periods, the commencement and continuance of each rent should be clearly marked.

As, apparently, an exception to the general rule, that a rent cannot be reserved to a stranger, it may be observed, that if a man who has a power under a settlement to uses, reserves the rent to him and *his heirs*, this rent will be incident to the reversion, and belong to the persons who from time to time shall be seised of the reversion subject to this lease. (*b*)

So also if he reserves the rent to himself, and every person to whom the reversion and

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(*y*) Co. Litt. 47. 2 Roll. Abr. 450.
(*z*) Ventr. 161.
(*a*) Drake *v.* Mundy, Cro. Car. 207.
(*b*) Whitelock's Case, 8 Rep. 69.

inheritance of the land shall belong during the term. (*c*)

Rents reserved upon leases made under powers in settlements, are generally reserved to the lessor and his assigns, and to the person or persons to whom for the time being, and from time to time, the reversion of the premises immediately expectant on the said term, shall belong.

The advice of Lord *Coke* is, to reserve the rent during the term. (*d*)

And in leases under powers, the rent should be reserved in such other mode, as is required by the circumstances of the power.

For instance: the rent must be reserved half yearly or quarterly, if it is so required by the power. And in leases made by husband and wife, tenants in tail, and ecclesiastical persons, under the different enabling statutes, the reservation should be in strict compliance with the words of the different acts of parliament. (*e*)

In this place it will be proper to observe, that when tenant in tail makes a lease, reserving rent to him and his heirs, this rent will be incident to the reversion, and belong to the issue in tail, if the reversion shall descend

(*c*) Whitelocke's Case, 8 Rep. 71.
(*d*) 8 Rep. 71.
(*e*) See Bac. Abr. ch. Leases.

to them, though they are not the general heirs. *(f)*

And if a person, seised *ex parte maternâ*, or in any other special manner, makes a lease, reserving a rent to him and his heirs, this rent will also be incident to the reversion, and belong to the heir inheritable to the estate, descending to him.

The like law applies to reservations of rent for lands in *Borough English* and *Gavelkind*.

But if a man seised in fee, makes a grant in fee, reserving a rent to him and his heirs, in this case, as there is no reversion, the rent will be considered as a new acquisition. And although the grantor was seised in fee *ex parte maternâ*, this rent will be descendible to his heirs generally, and consequently his paternal heirs will be preferred. (*g*)

In *Co. Litt.* 169, b. however, it is observed, "If two coparceners, by deed indented, "alien both their parts to another in fee, "rendering to them two and their heirs a "rent out of the land, they are not *joint* "*tenants* of this rent, but they shall have "the rent in course of coparcenary, because "their right in the land, out of which the "rent was reserved, was in coparcenary."— For this passage, no authority is cited by Lord *Coke*; and the authority to which re-

(*f*) Hard. 89. Vent. 163.
(*g*) Co. Litt. 12.

ference is made by one of the editors, is inapplicable; and if the position cited from p. 12. of the same book is law, as it seems to be, the doctrine of Lord *Coke* in p. 169, is irreconcileable.

From *Finch*'s Law, octavo edition, p. 9, there may be collected the distinction, that if two coparceners make a lease, reserving rent, they shall have this rent as coparceners, as they have the reversion; but if they grant the *reversion, excepting the rent*, so that the rent is severed from the reversion, then they shall be joint tenants of the rent. *A fortiori* in the example given by Lord *Coke*, the coparceners, since they retained no reversion, ought to be deemed joint tenants of the rent. The instance put by *Finch*, has the singularity, of an interest, which was several, becoming joint, and it is an anomaly, and the doctrine advanced in this passage is questionable.

In regard to rents reserved by deed, or without deed, it is to be observed, that an *indenture* may operate, as to the rent, by way of estoppel; so that if two joint tenants lease by indenture, reserving rent *to one* of them, this person alone shall have the rent: though if the lease had been by *deed poll*, or writing only, the rent would have been incident to the reversion, and consequently belonged to both joint tenants. (*h*)

(*h*) Co. Litt. 47. 2 R. Abr. 447.

9thly, In leases, also, a condition is inserted, when it is required by the intention of the parties. For instance: in mortgages there is a condition to express the right of redemption; but this right is more generally expressed, in modern deeds, by an agreement, rather than a condition.

In leases, the condition should be adapted to the nature of the lease, and therefore different conditions should be added, according to the intention of the parties, and the purport of the lease.

And in all these leases it is usual to add a condition, that the lease shall be *void*, or that there shall be a *right of re-entry*, if the rent shall be in arrear for a given time, and not paid when lawfully demanded.

When the clause is penned in these terms, the rent must be demanded on the land at the end of the limited time: and if that time is suffered to elapse without a lawful demand, no advantage can be taken of the default in payment of the rent within the time limited. As this is contrary to the intention of the parties, the clause should run to this effect:—"That if the said rent shall "be in arrear for the space of twenty-one "days after any one of the days herein- "before appointed for payment of the same, "and the same rent shall be lawfully de- "manded upon, *or at any time after*, the "expiration of the said twenty-one days,

"and not paid when demanded, Then," &c.

The advantages of this clause are, that it gives the lessor the right of re-entry, without imposing on him the necessity of enforcing that right by an entry on a particular day.

In leases of this sort also, a condition is inserted, to enable the lessor to re-enter, in case of breach or nonperformance of all, any, or either of the covenants, articles, clauses, and agreements, contained in the lease, on the part of the lessee, his executors, administrators, or assigns.

This is a very harsh clause against a tenant. It subjects him to a forfeiture by a breach of his covenant in any particular, however trivial; and therefore, on the part of the lessee it is always of importance to have an enumeration of those acts which are to be the ground of forfeiture.

Lessees of houses and farms are also restrained, by a covenant with a condition superadded, or by a condition from assigning or underletting; and farming leases are generally made determinable on the bankruptcy or insolvency of the tenant, or in suffering the leases to be taken in execution.

These restrictions are of great advantage to the lessor, and there is no objection to them when they are confined to the lessee

himself. But the condition is also extended to the executors and administrators of the lessee; and, in reference to them, the condition is extremely inconvenient, since it cannot be expected that the executors, &c. should occupy, &c.

These conditions are, on many occasions, made the instrument of great oppression. In short, they enable the lessor to defeat the lease, and thus gain all the advantage of improvements, unless the executors will hold, &c. The only mode of avoiding their operation is, to name certain persons, who may contract to sell, and appoint the purchaser the *executor*, *quoad* the term. This is suggested as an experiment, to be tried when particular circumstances of hardship may render it expedient.

It is settled, that a lease which restrains assignment, does not extend to an underlease.(*i*) When the restraint is on an assignment only, the executor may derive advantage, by making an underlease. And, in reason, the condition imposed on lessees ought not to be extended beyond the restraint of assignment. The practice, however, sanctioned by law, is different.

These conditions were originally introduced for the purpose of preventing the te-

(*i*) Cruso *v.* Bugby, Wils. Rep. 234.

nant, for the time being, from discharging himself from the liability to pay the rent; but when the point of law is fully investigated, the reason of this practice can never be applied to any one, except the lessee himself. And, at the common law, even the lessee could not discharge himself from the contract to pay the rent, and perform the covenants, without the consent of the lessor, since the lessee remains tenant to the lessor, until the lessor accepts the assignee as his tenant.

Hence the caution with which some gentlemen give their receipts for rent, expressing it to be received of the tenant by the hands of the assignee or occupier.

But when a lease is made with covenants to pay the rent, the lessee and his representatives will continue liable, under the covenant for payment of the rent, notwithstanding an assignment, and acceptance of the assignee as tenant. Therefore the caution is applied to many instances in which it is not necessary.

From a similar caution, lessors sometimes object to consent to an assignment, when the condition requires the assignment to be with consent.

Their apprehension is, that by consenting to the assignment, the original lessee would be discharged from the payment of the rent, &c. Such, indeed, would be the conse-

quence as far as regards the right to the rent under the privity of contract; but when there are covenants in the lease, on the part of the lessee, to pay the rent, &c. the lessee will continue liable, notwithstanding an assignment. Indeed, so far from being injured by the assignment, in point of remedy for the rent, when there is a covenant to pay the rent, the lessor, &c. may resort to his distress on the land, or may maintain an action against the assignee as tenant, or against the lessee or his representatives, or the assignee, upon the covenant; so that his securities are increased instead of being diminished.

Other usual covenants in leases, are those which are calculated to avoid the lease, on the bankruptcy of the lessee or assignee, on which a commission of bankrupt shall issue, (*k*) or his permitting his goods to be taken in execution. (*l*) Such conditions are good. It has even been held, that though an involuntary alienation, by reason of an execution, (*m*) is not a breach of a condition in restraint of assignment, yet an execution taken out, on a warrant of attorney confessed fraudulently, and for the very purpose of having the term taken in execution,

(*k*) Doe *v.* Galliers, 2 Term Rep. 133. b.
(*l*) Doe *v.* Carter, 8 Term Rep. 57, 300.
(*m*) Doe *v.* Carter, 8 Term Rep. 57.

is an assignment within the true construction of this condition. (*n*)

A lease to A. and his assigns, with a condition that he shall not assign, makes the condition repugnant: but there is no repugnancy in a condition that A. shall not assign to a particular person: or that he shall not assign within a limited time; or that he shall not assign without previous consent. Whenever consent is to dispense with the operation of the condition, it is prudent that the condition shall stipulate, that the consent shall be in writing, that parol evidence may not be adduced, or mere conversation made the foundation of the licence to assign.

Conditions in leases are of two sorts, *viz.*

1st, Those which give a right of entry;

2dly, Those which make a lease *ipso facto* void.

This depends on the language in which the condition is penned.

When the condition is merely to re-enter, the conclusion of the condition is in this form:—"Then and in that case," or "then "and in any or either of the said cases, it "shall or may be lawful to and for the said " and his heirs or assigns, [or, as "the case shall require, his executors, ad-

(*n*) Doe v. Carter, 8 Term Rep. 300.

" ministrators, or assigns,] into or upon " the said hereby demised premises, or any " part thereof, in the name of the whole of " the same, to re-enter, and the same pre- " mises to have again and retain, as in " his or their first and former estate, any " thing," &c.

And when the lease is to be absolutely void, then the conclusion of the condition is—" Then and in that case, and from thence- " forth, the said term shall cease and be " void, to all intents and purposes whatso- " ever."

The material difference between a condition to re-enter and a condition that the term shall be void, is that in the former case the term will continue till advantage is taken of the condition; and in the latter case, as far as relates to terms for years, the term will actually cease by breach of the condition. (*o*)

Another difference arising from the same cause is, that, in the former case, the forfeiture by breach of the condition may be waved or dispensed with (*p*), and in the latter case, it cannot; notwithstanding the rule, " that *Quivis potest renunciare juri pro se in-* " *troducto.*" (*q*)

(*o*) Co. Litt. 214, b.
(*p*) Dumport's Case, 4 Co. 119.
(*q*) 2 Inst. 183.

However it is clear, that *at the common law* an estate of freehold cannot, by the operation of a mere condition, cease without entry or claim, in whatever form the condition is penned.

But though an estate of freehold cannot be defeated by a condition, without an actual entry or claim, yet by a conditional limitation in a conveyance to uses, or in a will, one estate may be made, *ipso facto*, to cease, and another to commence. For the general rules respecting conditions, the language in which they are to be penned, to whom they are to be reserved, &c. and in what cases they may operate, see Shep. Touch. Com. Dig. and Bac. & Vin. Abr. chap. Conditions.

It now seems the more prevailing opinion, founded on *Dumport's* case, that if a condition consists of several branches; as for nonpayment of rent, nonperformance of covenants, &c.; a dispensation with any part of the condition, will be a dispensation with the condition entirely.

Even *Dumport's* case turns on a principle which savours of great refinement. Independent of that case, it would have seemed, that an assignment *with* licence, according to the condition, could never have been construed a breach of the condition; and that there could not have been a dispensation,

with a condition not broken. The law, however, is settled differently.

But the rule that the condition is entire, and that a dispensation with any branch of it, is a dispensation with every part of the condition, is not open to objection.

To prevent the application of *Dumport's* case, contrary to the intention of the parties, the condition may be specially penned, so as to make the right of entry depend on some act proceeding from the lessor, his heirs, or assigns, as the payment of a shilling, notice in writing, or the like.

The principle established by *Dumport's* case, renders it necessary to be particularly cautious in giving a licence to assign, and by that means dispensing with the condition. It was generally supposed, that the addition of a restriction in the licence, that the assignee should hold subject to the payment of the rent, and the performance of the covenants and conditions contained in the original lease, was sufficient to preserve the operative force of the condition, so as to guard against future assignments. But there seems no ground whatever to rely on this restriction, as sufficient to attain the object to which it is directed. The object may be effectually accomplished by a different means. Leases for years are considered in

law as mere chattel interests. They may be defeasanced by means of a grant or condition, as well after they are created, as at the time of their creation, although an estate of freehold cannot be defeated by any condition, except a condition annexed to the estate at the time of its creation or transfer. Such condition, to be operative in regard to a freehold lease, must be contained in the deed creating the lease, or in another deed delivered at the same time, and forming part of the same transaction, so as to fall within the principle, that *quæ incontinenti fiunt in esse videntur*.

As leases for years may be defeasanced by a condition, annexed to the term, at any time after its creation, resort should be had to the doctrine of the law respecting *Defeasances*, as the proper mode of imposing on the assignee the restriction against assigning without licence, whenever it is deemed an object to impose such restriction. A form of a deed of defeasance, adapted to this purpose, will be found in the Appendix.

These observations also lead to others, relevant to the form of conditions in mortgages. The conclusion of these conditions is sometimes, "that the term shall cease and "be void;" at other times, that "the mort-"gagee, his executors, &c. shall, upon the

" request, and at the costs and charges of " the mortgagor, his heirs or assigns, sur- " render the messuages, &c. and the residue " of the term therein, to the mortgagor, his " heirs or assigns, or assign the same mes- " suages, &c. for the residue of the term " therein, to such person or persons, and for " such purposes, as the mortgagor, his heirs " or assigns, shall direct or appoint." So in mortgages in fee, the proviso is either, " that the grant or release hereby made shall " cease and be void to all intents and pur- " poses whatsoever," or " that the mortga- " gee, his heirs, &c. shall convey to the " mortgagor, his heirs or assigns, or to such " person or persons, and for such uses, in- " tents, or purposes, as he or they shall di- " rect or appoint;" and sometimes the circumstances require that the proviso shall be still more special.

To begin with mortgages in fee will more fully illustrate the reason by which these different provisions are dictated.

The object of the proviso of redemption, is, in all cases, to express that there is to exist a right of redemption. When an actual and efficient condition is expressed, there is the two-fold use of reserving the right of redemption, and of defeating the estate of the mortgagee, in case the money shall be paid according to the condition. The leading rule is, that no one, except the person

by whom the conveyance is made, or his representatives, *viz.* his heirs as to real estates, or his executors as to chattel interests, can take advantage of a condition. The rule is pithily expressed in these terms—"a condi-"tion cannot be reserved to a stranger." The operation of the condition must be, to restore the seisin or estate of the person, from whom it moved, or to his heir, in case of real estate, or to his executor or administrator in the case of chattel interests. When A. is seised in fee, and conveys to B. in fee, by way of mortgage, the obvious intention of the parties is, that, upon payment of the money at the appointed time, the estate of B. shall cease, and revest in A. or his heirs. This may be accomplished by a condition, expressed in formal language; but when A. is seised in fee, as a mortgagee under B. and A. and B. join in a transfer of that mortgage, the effect of a condition introduced into this transfer, would, if the condition operated, be to restore the estate to A. the former mortgagee, instead of revesting it in B. the person in whom it is intended that the estate shall vest, when the mortgage debt is discharged. Great inconvenience might arise from having the estate revested in the former mortgagee. The same inconvenience might arise when A. is a trustee, instead of being a mortgagee; and though it seldom happens that a mortgage condition

is performed, so as to become operative and produce this inconvenience, yet, with reference to the possible inconvenience and technical propriety, there has been introduced into practice, an agreement that the mortgagee shall convey to the beneficial owner, his heirs or assigns, or as he or they shall appoint, instead of a condition, which, if it operated, would produce the inconvenience that has been noticed. Similar reasons operate in dictating the form of the proviso for redemption in mortgages, by way of demise, creating terms for years, and in assignments by the beneficial owner, as distinguished from assignments made by the beneficial owner with the concurrence of a former mortgagee or a trustee. In the present state of mortgage transactions, the probability, and almost certainty, is, that the money will not be paid at the day; and the form of the proviso for redemption, is in this particular, not so material as it would be, if the parties intended that this clause should have a full and precise operation. The more material point is, that the form of the proviso displays the skill of the person by whom it is prepared, and tends rather to shew the application of the law, than to produce any utility expected to arise from a strict adherence to form. The following observations will be added, as relevant to the point under consideration.

1st, In mortgages by way of demise for years, from A. to B. or from A. and his trustee to B. the proviso should be, that the term shall cease and be void.

2dly, This is also the proper conclusion, when A. has a term for years, and assigns to B. by way of mortgage; or

3dly, When A. seised in fee, conveys to B. in fee, by way of mortgage.

The same form also might with strict propriety, in point of law, be used when A. is seised in fee, and demises to B. for years by way of mortgage, and A. and B. join in an assignment and confirmation of the term to C. by way of mortgage, for securing money payable by A.; for in this instance the condition will operate by way of defeasance, and its effect, should the condition be performed, will be to extinguish the term for the benefit of A. as having the reversion; for the very ground on which the condition may operate in favour of A. is, that A. has the reversion, so that the defeasance partakes, in some degree, of the nature of a surrender. While inchoate, it operates as a contract for a surrender, and when it operates, it produces the effect of an actual surrender. It may be safely assumed, that a defeasance cannot give effect to the intention of the parties, except it is between persons, who stand in the relation of lord and tenant, or tenant and reversioner. In all

other cases, the general form of the proviso for redemption, should stipulate that the mortgagee shall convey or assign to the person intitled to the redemption, his heirs, &c. or as he or they shall direct. These clauses, indeed, are become general in practice, and have almost excluded conditions in their proper form; and it is more correct, that these agreements for redemption should omit all words which may be construed as conditions, so that they may be clearly and unquestionably agreements for redemption, and not conditions, either in operation or in form.

Lastly, In all leases, there should be covenants, on the part of the lessee, adapted to the nature of the lease and the agreement of the parties: in particular there should be a covenant for payment of rent.

In farming leases there should be covenants, prescribing the mode of managing the farm.

In building leases and repairing leases there should be covenants to build, repair, &c. and for insurance against fire.

And in leases of houses for occupation, there should be covenants respecting the repairs, fixtures, painting, &c.

In short, the covenants in every lease must vary with the intention of the parties, and the agreement between them; and for all these purposes the best guides are

good forms, to be used by way of precedent.

Contrary to the generally received opinion, no instrument requires more care than a lease. The covenants should be penned with great attention to the language, so as to keep all the parts consistent, and express the precise intention of the parties.

All covenants should be by the covenantor, for himself, *his heirs, executors,* administrators, and assigns. The assignee will be bound by all covenants which concern the land. In short, he will be bound, though not named.

And the covenants should be with the lessee, and his heirs and assigns, if the heirs are to be special occupants of a freehold lease; and, in all other cases, with the lessee, his executors, administrators, and assigns. And care should always be taken to use these relative terms according to the nature of the interest which is granted, and the persons who are to be bound by the covenants, or to have the advantage of them.

The general points to be observed in covenants are,

1st, The subject, *viz.* the thing to be done or omitted;

2dly, By whom, or to whom;

3dly, At whose request, and at whose costs and charges;

4thly, The time;

5thly, The place;

6thly, The circumstances or conditions under which the covenants are to be performed.

And in preparing the covenants, these different points should always be kept in view, or at least as many of them as are applicable to the case.

Of the Theory of the Law as it applies to the Conveyance by Lease and Release.

As this is the common assurance which obtains in general practice, and as settlements and conveyances in fee and for lives to purchasers and mortgagees, are, for the most part, made by lease and release, almost to the exclusion of every other species of assurance, it is important that every part of the learning connected with this subject, should be fully understood; and it will be convenient to trace:

1st, The origin of the conveyance and the principles on which it depends.

2dly, The parts.

3dly, Who may be the releasor, and

4thly, Who may be the releasee.

1. In respect of personal qualifications.
2. In respect of estate.
3. In respect of privity.

4thly, Of the form of a lease for a year.

5thly, Of the form of the release:

And in the progress of these observations it will be proper to distinguish those cases in which the lease and release are necessarily parts of the same assurance, from those in which the release may operate in some other mode.

1st, *Of the origin of this assurance.* At the common law the conveyance in general use was feoffment, and livery of seisin was the efficient part of this conveyance. The advantages of this assurance, in passing the freehold by right or by wrong (*a*); of binding future as well as present rights; and of restoring the seisin of those who had been disseised; gave it, in more early times, a decided preference over every other species of assurance; and as lands were rarely in lease, but the possession generally accompanied the conveyance, this was the only species of assurance which, substantively and of itself, could transfer the possession, and complete the title to an estate of freehold, or of inheritance (*b*). That the feoffment might operate it was essential that the feoffor should be in possession, or should have the possession at the time of making livery (*c*). Even at this day a feoffment will be of no avail, unless the feoffor is in possession when livery is made; or livery is made with the consent of the person who retains the possession. The tenant must even give up the possession, at least for this occasion, though it may be on the terms of *saving his own right*. It has been accordingly decided, that livery made of lands in

(*a*) Co Litt. 9, a. 366, b. 367, a.
(*b*) Litt. § 611. Co. Litt. 330, b.
(*c*) Dyer, 106, 131.

the possession of a termor, with the consent of that person, is a good feoffment, and that the term may be saved by the lessee, in consequence of an express stipulation.(*d*) As at the common law, a termor was considered as the bailiff (*e*) of the freeholder, rather than as having a permanent interest of his own; and as by the rules of that law, before they were altered by the statute of Hen. VIII., (*f*) the interest of the termor might at any time have been defeated by the freeholder, the feoffment as a rightful conveyance was considered as the appropriate assurance of the person who had an estate of freehold, conferring a right to the possession. Two other cases might have occurred at the common law: 1st, the possession might have been in a tenant for years, or for life, and the intention might be to grant a reversion or remainder to a stranger; or 2dly, there might have been an interest for years or for life, or other particular estate, and an intention to grant a further interest to the tenant of that estate. The common law provided for each of these cases. A *grant* was the proper assurance (*g*) for the conveyance of the *reversion* to a stranger. This assurance was equally proper for transferring to a stranger an estate in *remainder*, since the owner of this reversion,

(*d*) Dyer, 362. Shep. T. 202.
(*e*) Essay on the Quantity of Estate, ch. *Freehold.*
(*f*) 21 H. 8. c 15.
(*g*) Litt. 567. Shep. T. 227, 228.

or remainder, had not any right to the possession, it was not competent to him to make feoffment of his own authority: but to preserve the notoriety in the change of the tenancy, and the certainty of the person who was, or who even might become, tenant of the freehold, the law required the solemnity of a deed by way of grant, to be perfected by *attornment*, of the person connected in privity of estate with the reversioner or remainderman. *(h)* As often as the estate of the tenant himself was to be enlarged by a further grant, to him, his consent to accept the grant, superseded the necessity of an attornment. (*i*) It also superseded the ncessity of livery of seisin; for it would have been in vain to deliver the possession to a person to whom it already belonged. (*k*) A deed was required even in this case, (*l*) and on a close investigation of the authorities, it will be found that whenever a grant might have been made to a stranger, a release might be made to the particular tenant under the circumstances that such person was the tenant whose attornment would give perfection to the like grant to a stranger. (*m*) From these deductions it seems to follow that a release is no more than a

(*h*) Litt. 567. Co. Litt. 315, b.
(*i*) Litt. § 578.
(*k*) Shep. T. 206.
(*l*) Shep. T. 227, 228.
(*m*) See Litt. chap. Attornment.

grant to the particular tenant, instead of being a grant to a stranger; and this assurance, in all probability, took its denomination of a release from the circumstances of its being a repetition of the act, by which the lease to the tenant was made.

It is almost needless to observe that when an instrument may operate as a grant to a stranger, it may under the like circumstances, have the effect of a grant to a person, who already has a particular estate, although for want of that privity which is essential to its operation, by way of enlargement of the particular estate, it cannot be used, or pleaded as a release. The only difference, however, is that the grantee must plead this assurance as a grant instead of pleading it as a release: and before the necessity of that ceremony was superseded, attornment was essential to the validity of the deed of grant (*n*).

From the text books, and from the best authorities, it might be inferred, that no estate, except an estate giving a right to the *possession*, can be enlarged by release. The language of *Littleton* (*o*) is,—"Also if a man "letteth his land to another for term of "years; if the lessor release to the lessee all "his right, &c.; before that the lessee had

(*n*) Co. Litt. 309. a. Shep. T. 253.
(*o*) S. 459.

" entered, into the same land, by force of " the same lease, such release is void, for " that the lessee had not *possession* in the " land, at the time of the release made, but " only a right to have the same land, by " force of the lease, but if the lessee enter " into the land, and hath possession of it, by " force of the said lease, then such release " made to him, by the *feoffor* (*p*) or his heir, " is sufficient to him by reason of the privity, " which, by force of the lease, is between " them, &c." The commentary of Lord Coke (*q*) on this passage shews that " Before entry " the lessee hath only an *interesse termini*; " an interest of a term, and no *possession*, " and therefore a release which enures by way " of enlarging of an estate cannot work with- " out a possession; for before possession there " is no reversion." And *Blackstone* in his Commentaries, 2 Vol. 339. treating of this assurance observes it is thus contrived, " A lease, or " rather a bargain and sale, upon some *pecu-* " *niary*(*r*), consideration, for one year is made " by the tenant of the freehold, to the lessee " or bargainee; now this, without any inrol- " ment, makes the bargainor stand seised to " the use of the bargainee, and vests in the " bargainee, the use of the term, for a year,

(*p*) Should be lessor.
(*q*) 270. a.
(*r*) Should be valuable, see *infra*. and 2 Inst. 671.

" and then the statute immediately annexes " the possession. He therefore, being thus " in possession, is capable of receiving a " release of the freehold, and reversion, " which, we have seen before, must be made " to a tenant *in possession* : and accordingly " the next day a release is granted to him, " and so a conveyance by lease and release " is said to amount to a feoffment."

In another place the learned commentator treats of the necessity of an *estate in possession* as the ground work of a release: This is not very accurate, though this proposition is less objectionable than the former. (*s*) In this passage he is taking a view of the effect of a common law lease and release of lands held for an estate in possession.

By these expressions of his predecessor, Mr. *Woodeson* has been led into some difficulty, as is evident from a passage in his 2d vol. of the Vinerian Lectures.(*t*) He observes, " Sir Wm. Blackstone hints at a doubt for- " merly entertained concerning this mode of " conveyancing. This objection was that there " ought to be an actual entry by the lessee, " under the prior indenture," and concludes, " But this appears to be a very groundless " scrupulosity; and to oppugn the direct

(*s*) 2 Black. Com. 324.
(*t*) p. 302.

" sense and general construction of the sta-
" tute. Perhaps a more solid difficulty
" arises when we come to consider how a
" lease and release can be available under
" the statute of uses, where a *reversion* or
" *remainder* is to be conveyed. For how
" can the vendor bargain and sell the *pre-*
" *sent possession* which he is not himself in-
" titled to invade? or how can the law
" supply the *actual entry* of the lessee when
" such entry would be wrongful and illegal."

In Sheppard's Touchstone (*u*), and in Sheppard's Abr. (*v*) a passage nearly to the same import is found, but it contains an antidote to the doctrine, by admitting that an estate in *reversion* in deed, may be enlarged.

In these several passages, except the passage from *Woodeson*, the word *possession* is to be understood as applicable to *a vested estate* giving a present or future right of enjoyment. The phrase has been borrowed from the statute of uses, as distinguishing those uses which became legal estates and conferred vested interests, by means of that statute. In short the several writers have kept too closely to the modern practice of a lease and release, as parts of the same assurance; instead of opening the principles and learning on this

(*u*) Shep. T. 321.
(*v*) Shep. Abr. Title Release, 157, 158.

subject from the rules of the common law. That these expressions tend to confound is sufficiently obvious from the observation of Mr. *Woodeson*, and from the difficulty he has experienced in reconciling, with principle, the practice, as applied to conveyances by release of *reversions* and *remainders*. If a gentleman of Mr. *Woodeson's* acknowleged attainments and experience, could be led into a difficulty by expressions of this sort, how is it to be expected that students should, in the early part of their studies, be able to understand, in their technical sense, phrases of such doubtful or ambiguous meaning? Any one, except a lawyer, might read the Commentaries of Blackstone on this subject, and without any imputation on his judgment arrive at the conclusion, that no one except a person who had the *actual possession* of the land, was capable of a release in enlargement of his estate. The pointed language of *Littleton* and of *Lord Coke*, taken substantively and without the context, might be considered as leading to the same conclusion. *Littleton*, however, meant nothing more than to mark the difference between an *interesse termini*, and a term for years. The former is merely an *interest* in the land, and not an estate, while the latter is an actual estate. (*w*)

(*w*) Co. Litt. 270. a. 46. b. and Litt. S. 58.

The interest, while executory, does not admit of enlargement. (*y*) It may be released, (*z*) or assigned, (*a*) but cannot be surrendered; (*b*) though certain acts are said to amount to a surrender in law; nor (it is said) confirmed, (*c*) but this is at least doubtful; (*d*) nor is it an impediment to a surrender, or merger, of a prior interest, in a more remote interest.

On this subject of possession, some of the expressions of Lord Coke are not more definite. His context, however, relieves the question from all difficulty. From this writer, (*e*) and also from Sheppard's Touchstone, (*f*) Sheppard's Abr. (*g*) and Mr. *Butler's* Annotations, (*h*) and still more clearly from first principles, it is to be collected that an estate is capable of enlargement although that estate is a reversion or remainder, and consequently does not confer a right to the immediate possession. In the succeeding division some further observations will be introduced illustrative of the origin and history of the lease and release, as parts of the same assurance.

(*y*) Co. Litt. 46. b.
(*z*) 270. b.
(*a*) Co. Litt. 46. b.
(*b*) Co. Litt. 338. a. Shep. T. 301.
(*c*) Co. Litt. 296. b.
(*d*) Shep. T. 311.
(*e*) Co. Litt. 270. a.
(*f*) 322.
(*g*) 157.
(*h*) Note 3 on Co. Litt. 270. a.

2dly. *Of the principles on which this assurance depends.*

The difficulty respecting this assurance, as a substitute for a feoffment, vanishes when its distinguishing characteristics are examined. In its principles it is founded on the rules of the common law, (*i*) and consists of two parts.

1st. An assurance creating an estate to be enlarged, and

2dly. An assurance, granting another estate in enlargement of the estate thus created, for the purpose of being enlarged.

The practice of a lease and release as parts of the same assurance, is founded on the rule that a particular estate, already vested, may be enlarged by the release, of the person who has a reversion or remainder expectant on that estate; so as the two estates are connected in privity, (*k*) in such manner as will afterwards be noticed. Since convenience dictated the use of the lease and release as parts of the same assurance, so in modern practice, the object of the lease for a year, is to create an estate which shall certainly be attended with the requisite privity, and confer an interest which admits, beyond all doubt, of being enlarged.

(*i*) Barker v. Keate, 2 Mod. 251.
(*k*) Co. Litt. 273. a.

To a valid feoffment, it is necessary that livery shall be made (*l*) by the feoffor, either in person or by attorney ;(*m*) and such livery must be made to the feoffee, (*n*) in person or by attorney ; and an attorney who is to give or receive livery, must be appointed by deed. (*o*) Assurances intended to be made by feoffment, frequently failed of effect on account of some error attending the ceremony of livery. Besides the operation of the assurance is suspended till livery of seisin has taken place. As the livery is the essential part of the assurance, (*p*) no seisin or estate passes till livery of that seisin is made.

The owners of lands lying at a distance from their residence, were greatly embarrassed by this suspense in transactions respecting their property. It may reasonably be supposed, that no purchaser would pay his purchase money ; or mortgagee advance the intended loan ; till his title was placed on a solid and certain footing, beyond the power of the seller or mortgagor, to defeat the intended sale or mortgage, by livery in the mean time, to some other person : or by a

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(*l*) Littleton, S. 59.
(*m*) Co. Litt. 48. b.
(*n*) Ib.
(*o*) Ib.
(*p*) Co. Litt. 48.
Mr. Butler's Note.
Co. Litt. 271. b.

revocation of the authority he had executed, or by any other accident, as the death of the grantor or grantee. Nor were the inconveniences much less when the grant was of a reversion, or remainder, expectant on a particular estate, in a stranger. By the common law and till the statute for *the amendment of the law*, (*q*) attornment of the particular tenant was essential to the validity of the grant: (*r*) and the tenant might in many cases, withhold attornment: or the grantor or grantee might die, before attornment had taken place. Each of these events would defeat the grant; for unless attornment was obtained in the life time of the grantor and also of the grantee, (*s*) the grant became inoperative, and failed of effect. Besides there was a notoriety attending livery, or attornment, which must have been distressing in transactions of delicacy, which required secrecy; and in giving the history of this assurance, it is said, this conveyance was at first only purposely contrived by Serjeant Francis Moore at the request of the Lord *Norris*, to the end that some of his kindred or near relations should not take notice by any search of public records what

(*q*) 4 Ann. cap. 16, sect. 9.
(*r*) Litt. s. 567.
(*s*) Co. Litt. 309. a. 315 a. Sir Rowl. Heyward's case, 2 Co. 35.

conveyance or settlement he should make of his estate. (*t*) In Barker *v.* Keate also, it is stated by Lord C. J. *North*, that Mr. Serj. Moor, was the inventor of this mode of assurance.

The inconveniences thus experienced, naturally led men of extensive practice, to contrive some mode of conveyance, by which the estate might be transferred immediately, and without any interval, from one man to another, although both parties were at a distance from the lands; and without even the necessity of their meeting for the purpose, or their giving any written authority to deliver or receive the seisin.

It must have been observed, that the tenant of a particular estate might receive an *enlargement* of that estate, without any livery of seisin *to him* or any attornment *by him*; or even though another person was in possession, without any attornment of that person. The common law supplied various instances of this doctrine; and several authorities, applicable to this point, will be found in the sequel.

The steps towards this assurance seem to have been progressive. On principles of tenure the proper assurance to enlarge the estate

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(*t*) Fabian Phelips Treat. on the Writ of Capias 19. b. 4 Reeve's Hist. of the Com. Law, 335. Cruise's Digest, 4 Vol. p. 196.

of a person who was already a tenant by virtue of a particular estate was a release.

Hence it occurred to make a lease at the common law, as the means of passing the freehold, or even the inheritance, without livery. (*u*) Such instances were however rare, and very little accommodation was obtained from this arrangement, as it was the practice to enter by virtue of the lease, prior to the execution of the release; or when the lands were already in the tenancy of some other person, the attornment of that person was requisite: and a grant would, in that case, be equally efficacious with a lease and release, and it may reasonably be concluded that the lease and release were, in more early times, applied only as an assurance of lands, held for an estate in possession, (*v*) and as a substitute for a feoffment.

When the seller or purchaser was resident at a distance from the property; or the purchaser was so circumstanced on account of absence, &c. that he could not make a letter of attorney to receive livery; the necessity for a substitute for livery must have been particularly felt; and the active ingenuity of the profession, led them to the expedient of making a lease to *some person* resident on the spot,

(*u*) Barker v. Keate, 2 Mod. 252.
(*v*) Ib.

merely for the purpose of creating a particular estate, that the lessee might enter, and the reversion might be divided from the possession, and the reversion thus severed, might be granted to the intended purchaser, and perfected by the *attornment* of the nominal lessee. Such must have been the motives which gave rise to the practice noticed by Lord C. J. *North*, (*w*) when he observes, "The usual conveyance at common law "was by feoffment, to which *livery and seisin* "*were necessary*, the possession being given "thereby to the feoffée: but if there was a "tenant in possession, and so livery could "not be made, then the reversion was grant-"ed, and the particular tenant always at-"torned; and upon the same reason it "was that afterwards a lease and release "was held a good conveyance to pass an "estate: but at that time it was made no "question but that the lessee was to be in "actual possession before the release."

Such grant, it must be remembered, operated strictly in the mode of a grant, and not as a *release*. It was a grant to a *stranger*, and not the repetition of a grant to the *tenant*: and even these, and the like contrivances, were rendered, in a great measure, unnecessary by the statute for transferring uses into

(*w*) Barker v. Keate, 2 Mod. 251.

possession : (*x*) a statute which enabled the owner, through the medium of a conveyance to uses, to vest the seisin in a person at a distance: for this purpose a feoffment, or according to the circumstances of the seisin or ownership, a grant, and a selection of a proper person to receive such feoffment or grant, was all that was requisite. Still however there must have been livery of seisin of lands held for an estate in possession, and an attornment by the tenant, when the grantor had merely a reversion, or remainder, and transactions were exposed to notoriety by the necessity there existed for livery of seisin, or attornment of the tenant. A bargain and sale might indeed have been made after this statute : so as to vest an estate of freehold or inheritance in the bargainee : but such bargain and sale required inrolment, and the inrolment would express the very language of the transaction and thus give it still greater publicity.

A leading principle was, in the progressive steps which have been noticed, applied in practice ; and the only inconvenience which remained was the necessity of entry by a lessee, or of attornment by the tenant, who already had a prior estate.

To prevent the necessity of such entry on

(*x*) 27. H. 8. c. 10.

the one hand, or of attornment on the other, must have been an object of improving practice, and that object was rendered still more important by the circumstances of the times, and the prospect of a more frequent change of property; a prospect arising from the disposition towards commerce, and the alteration in opinion respecting the policy of military tenures. Mortgages were now more common than at more early periods: and commercial credit would not allow of a disclosure of transactions of this sort. Founded on confidence, they required secrecy.

In the reign of Hen. 8. (*y*) the statute for *transferring uses into possession*, was passed into a law. By that statute, uses were transferred into estate. Various were the means by which uses were created. A bargain and sale was one of these means, and such bargain and sale might be for *years*, for life, or in fee. (*z*) Shortly after the statute of uses was passed into a law, the statute of inrolments (*a*) was enacted. The object of this statute (*b*) was to introduce a ceremony which should be attended with notoriety, as a substitute for the ceremony of livery, attornment,

(*y*) 27 H. 8. c. 10.
(*z*) Shep. T. 218. 2 Black. Com. 338. 2 Inst. 671.
(*a*) 27 Henry 8. c. 16.
(*b*) Note to Co. Litt. 48. a.

&c. and it renders it necessary that all bargains and sales, under the statute of uses, for an estate of inheritance or freehold, shall be inrolled within a limited time: viz. six lunar months: but this statute is silent respecting the inrolment of bargains and sales for years; and in the reign of Queen Elizabeth several points were resolved: and they must have had considerable influence in regulating the practice, and in introducing the bargain and sale as a foundation for the release.

In Sir *Rowland Heyward's* case, (c) the doctrine of the court was, "When a man "seised of land in fee for money, demises, "grants, bargains and sells his land for years, "he, which is owner of the lands by his ex- "press grant, gives election to the lessee "to take it by the one way or the other, for "he hath sole power to pass it by demise or "bargain, and therefore the law will not "make construction against such express "grant." *And Lord Coke* says "It was "agreed that if this interest should take "effect by bargain and sale, then an attorn- "ment is not necessary, for the statute of 27 "Henry VIII. c. 10. of uses doth execute the "possession to it, and the statute of 27 Hen- "ry VIII. c. 16. of enrolments doth not ex-

(c) 2 Co. 35.

" tend to it, because no estate of freehold " passes but only an estate for years. Also " at this day an use and interest pass in a " manner *uno flatu* together, in an instant."

And the 7th Resolution in this case was, " Although the lessees in the case in ques- " tion have entered generally, yet they may " afterwards elect either to take by the de- " mise or by the bargain and sale: for their " general entry cannot be any determination " of their election, more than if one be exe- " cutor and devisee of a term and he enter- " eth generally, it is no determination of his " election."

And at the conclusion of the Report it is stated that the lessees made their election to take by bargain and sale, and thereupon they had rents, which otherwise they could not have.

In *Fox's* case, (*d*) the facts were that Edward Fox granted the lands to Smallman and others for lives, and afterwards in consideration of 50*l.* demised them to Thomas Powys for 99 years, at a yearly rent of 40*s.* and the only point in the case was whether the demise and grant to Thomas Powys should amount to a bargain and sale, so that the reversion with the rent should pass to Thomas Powys by the statute of uses, without any attorn-

(*d*) 8 Rep. 93.

ment; and it was adjudged, "That the "demise and grant upon consideration of "50*l.* amounted to a bargain and sale "for the said years, for in case when a free- "hold or inheritance shall pass by deed in- "dented and inrolled, it need not have the "precise words of bargain and sale: but "words equipollent, or which do tanta- "mount are sufficient.(*e*) That the intent of "the grantor may be well collected that he "did intend that the grants should take "effect presently, and should not depend "upon any subsequent attornment, for the "rent reserved thereupon was payable pre- "sently, and therefore it will be reasonable "that Thomas Powys the lessee should have "the rent reserved on the first lease for lives "presently, and that he cannot have before "attornment, which peradventure will never "be made, and *eo potius* because the said "Thomas has no means to compel the first "lessees to attorn: but if it shall pass as a "bargain and sale, it shall be presently exe- "cuted by the statute of 27 Henry VIII, for "there needs no inrolment in this case, be- "cause but a term for years passes and no "estate of freehold, and there needs no at- "tornment, because it is executed by the "statute; and by this construction every one

(*e*) 7 Rep. 40, b. Bedel's Case. Barker v. Keate, 2 Mod. 247.

" will have remedy for that which he ought " to have."

From the cases to which reference has been made, it was easily to be collected that a particular estate for years might be created by bargain and sale, and neither *entry*, *attornment*, or *inrolment*, was essential to the efficacy of this assurance. The bargain and sale passed an use, and the use was executed by the statute of 27 HenryVIII. for transferring uses into possession,and the use became a *term*, in other words, an *actual estate;* and the bargainee, was without entry, precisely in the same circumstances as a lessee at the common law was after entry or attornment, with the difference only that a bargainee could not maintain *trespass* (*f*) for any injury to the possession, until he had actually entered, but this was a circumstance which though it affected the remedy for injuries to the possession, was not of any importance in the consideration of the principles on which the doctrine of releases in enlargement of a vested estate for years, depended.

This common law doctrine of enlargement equally extends to estates of freehold and estates for years.(*g*) But as an estate of freehold could not be created without obtaining livery

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(*f*) Cro. Jac. 604. Lutwich v. Mitton, Owen 87. Green v. Wiseman, Carthew, 66.

(*g*) Littleton, Sect.450, 459.

of seisin, attornment on a grant, or inrolment on a bargain and sale, an estate for years *alone* afforded the convenience which was so desirable.

The material point for consideration was, whether an estate for years created by bargain and sale was capable of enlargement by the release prior to entry? And the learning and researches of the conveyancers of that day, aided by the decisions which took place on the statute of uses, and which have been already stated, enabled them with safety and certainty, to arrive at the conclusion, that such estate being actually vested, was capable of enlargement, in the same manner and upon the same principles, that an estate created by common law demise was, after entry, capable of enlargement. The decisions in *Lutwich* v. *Mitton*, (*h*) and *Barker* v. *Keate*, (*i*) confirmed these opinions.

In *Lutwich* v. *Mitton*, it was resolved by the two Chief Justices, *Montague* and *Hobart*, and by *Tanfield*, Chief Baron, "That upon "a deed of bargain and sale for years whereof "he himself (*k*) is in possession, and the bar-"gainee never entered, if afterwards the "bargainor make a grant of the reversion "(reciting this lease,) (*l*) expectant upon it

(*h*) Cro. Jac. 604.
(*i*) 2 Mod. 249.
(*k*) The bargainor.
(*l*) Such recital is not absolutely necessary. For the reasons stated in another part of these observations it *is prudent* to insert it.

" to divers uses, that it is a good conveyance " of the reversion, and the estate was exe- " cuted and vested in the lessee for years by " the statute, (*m*) and was divided from the " reversion, and not like to a lease for years " at the common law; for in that case *there is* " *not any apparent lessee until he enters*, but " here, by operation of the statute, it abso- " lutely and actually vests the estate in him " as *the use*, but not to have trespass without " entry and actual possession; wherefore " they *would not permit this point to be further* " *argued.*"

In *Barker* v. *Keate*, Lord C. J. North, speaking of the conveyance by lease and release said, " At first when this sort of con- " veyance was used, the lessee upon the lease " for a year did always make an actual entry, " and then came the release to convey the " reversion, but that being found trouble- " some, the constant practice was to make the " lease for a year by the deed of bargain and " sale, for the consideration of five shillings, " or some other small sum, and this was held, " and is so still, to be good without any ac- " tual entry, and the bargainee thereby is " capable of a release, (though he cannot " bring an action of trespass without entry:) " for when money is the consideration of

(*m*) 27 H. 8. C. 10.

" making the bargain and sale, it is executed " by the statute of uses, and so the release " upon it is good, but if the deed be not exe- " cuted it is otherwise." And in delivering the judgment of the court in the same case, the same C. J. observed, " After the " statute of uses it became an opinion, that " if a lease for years was made upon a *valu-* " *able* consideration, a release might operate " upon that without an actual entry of the " lessee, because the statute did execute the " lease and raised an use presently to the " lessee."

" The lease and release are but in nature " of one deed, and then the intent of the " parties is apparent, that it should pass by " the statute and *eo instante* that the lease is " executed, the reservation is in force."

It was some time, however, after the first adoption of the lease and release, before the profession were reconciled to the assurance. (*n*) Difficulties were suggested. They arose from a misapprehension of the principles on which the lease and release, as applied in modern practice, were founded; from applying the common law learning to an assurance depending partly on a bargain and sale, which is an assurance deriving its effect from the statute of uses. (*o*)

(*n*) 2 Black. Com. 339.
(*o*) Barker v. Keate, already cited.

While the profession read *Littleton*, or Lord *Coke's* Comments in a literal sense, as requiring that there should be an estate accompanied with *actual possession*, and not merely a *vested estate* giving a present right of present or future enjoyment, they were perverting the *use*, and the object of this species of assurance; and were reasoning on principles which were inapplicable. The cases however of *Lutwich* v. *Mitton*, and *Barker* and *Keate* removed these doubts, and from that period, the lease and release may be considered as having, for all purposes of general practice, (*p*) superseded every other assurance, and as having been applied, with equal reason, and with equal security, in conveying lands held for an estate in possession, and lands held for an estate in reversion or remainder. We have the authority of Lord C. J. North, in his judgment given on *Barker* v. *Keate*, that "The case "put by *Littleton* in section 459, is put at "the common law, and not upon the statute, "when he saith that if a lease be made for "years, and the lessor releaseth all his right "to the lessee before entry, such release is "void, because the lessee had only a right, "and not the possession, which *Lord Coke* "in his Comment calls an *interesse termini*,

(*p*) 2 Black. Com. 339.

"and that such release shall not enure to en-
"large the estate without the possession, which
"is very true at the common law, but not upon
"the statute of uses. And it was determined
"that there was no need of an actual entry
"to make the lessee capable of the release,
"for by virtue of the statute he shall be ad-
"judged to be in actual possession."

It cannot be too strongly impressed on the mind that the part of this assurance which is called a lease, operates in most cases as a bargain and sale, and is an assurance through the medium of the statute of uses, and not a common law demise. However, (as may be collected from *Heyward's* case, (*q*) and *Fox's* case, (*r*), it is in the option of the person who claims under this assurance to use the same either as a common law demise, with a release in enlargement of the estate; or as a bargain and sale, through the medium of the statute of uses, with a like release in enlargement. But the general mode of pleading this assurance ascribes to the lease for a year, the operation of a bargain and sale under the statute. This however is not necessary; and when circumstances will admit, the lease may be pleaded as a demise by the common law, perfected by entry; (*s*) and if the per-

(*q*) 2 Co. 25.
(*r*) 8 Co. 93.
(*s*) Heyward's Case, 2 Co. 35.

Mr. *Fearne* seems to have fallen into an unaccountable mistake. He treats it as absolutely necessary that there should be either a lease and release, or a bargain and sale inrolled.

On this mistake, it is sufficient to observe, that at the common law, a grant was the only mode by which a reversion or remainder could be transferred (*y*) from the owner to a *stranger*; and the common law has in no respect been altered, except in dispensing with the necessity of attornment, (*z*) as essential to the perfection of a grant.

It is said a lease and release countervail a feoffment. (*a*) By this expression it must be understood that, considered merely as a conveyance, this assurance has the operation of a feoffment, and that it has this operation so far only as it is a conveyance of an estate of freehold or inheritance in possession; not that it has any of the collateral qualities of a feoffment; as divesting estates of strangers; purging disseisins; creating discontinuances, and the like. (*b*) On the contrary an assurance by lease and release operates only as a grant, and passes no more than the parties may rightfully pass.

(*y*) Co. Litt. 49. a. Shep. T. 227, 228.

(*z*) 4 Ann. c. 16. s. 9.

(*a*) Co. Litt. 207. a. 2 Black. Com. 339. Supra. And Mr. Butler's Note.

(*b*) See the Distinctions in Vin. Abr. Feoffment, B. 2. pl. 1. and the Note. Littleton, 600, 606. Seymour's Case, 10 Co. 95. Machell v. Clark, 2 Salk. 619. Doe ex dem. Odiarne v. Whitehead, 3 Burr. 704.

In many particulars there is a difference between a feoffment and a lease and release. A feoffment must be founded on the *possession*, (*c*) and it must necessarily pass the seisin, whether it was at the time of livery in the feoffor, or in a stranger. Thus a feoffment may be a wrongful conveyance, operating as a disseisin of some other person; and although the feoffor has merely an estate for years (*d*) for life (*e*) or in tail, (*f*) or even a naked possession (*g*). Hence the observations of Mr. *Knowler*, in his learned argument in *Taylor* v. *Horde*, 1 *Burr.* 60. that "a feoffment operates on the possession, without any regard to the estate or interest of the feoffor," and again "it is most clear that a feoffment may be made by any person in possession.

In a feoffment also, livery is the essential part of the conveyance. (*h*) The deed or charter of feoffment is merely evidence of the grant, and it is in some cases only that such charter of feoffment is necessary, but a lease and release are merely a rightful conveyance, (*i*)

(*c*) Co. Litt. 9 a. 366. b. 367. a. 328. a. Litt. 611. Read v. Errington, Cro. Eliz. 321.
(*d*) Litt. 611. Co. Litt. 330. b.
(*e*) Ib.
(*f*) Litt. s. 599.
(*g*) 2 Inst. 412.
(*h*) Shep. T. 204.
(*i*) Litt. 600, 606.

and there must be a seisin as a foundation on which they may operate, and they pass that degree of interest only which is in the grantor, and it is for this reason that it is called an innocent conveyance; (*k*) and a lease and release either at the common law, or through the medium of a bargain and sale cannot be pleaded as a feoffment. (*l*)

In discussing the origin of the assurance by lease and release it has been necessary to advert to the principles on which it is grounded, and it will be proper to enumerate the more leading points; and they are,

1st, That by the doctrine of the common law, a vested interest for years, either in possession, reversion, or remainder, may be enlarged by release.

2dly, That a lease for years, at the common law, of lands in possession, will not give an actual estate till entry; but a lease for years of lands in reversion, will, now that attornment is rendered unnecessary, give an actual estate without either entry or other ceremony, as attornment or the like.

3dly, That a bargain and sale for years may give an actual estate prior to entry.

4thly, That an estate arising from a bar-

(*k*) Supra, p. 236.

(*l*) Broke Feoffment. pl. 44. Vin. Abr. Feoffment. B. 2. pl. 1.

gain and sale for years, may vest *instanter*, (*m*) and be enlarged by release; and

Lastly, That the object of the lease for a year, more properly denominated a bargain and sale for years, is to create such particular estate, as may be enlarged by release.

2dly, *Of its Parts.*

A lease and release are considered in law as constituting one assurance, and an assurance which consists of two parts, (*n*) perfectly distinct, each producing its own particular operation.

1st, Of a lease for a year or some other short period, measured by a definite space of time so as to be a chattel interest; and

2dly, Of a release in enlargement of the estate, created by the lease. It is of the very essence of this assurance, as a substitute for a feoffment, that there shall be a lease creating a particular estate and separating the same from the inheritance; so that there may be a reversion expectant on that estate; for unless a particular estate is created, there does not exist any interest capable of enlargement; (*o*) and on the other hand, unless the inheritance is divided from the possession by means of a particular estate, there is no interest of that particular species which can be

(*m*) See the next division.
(*n*) Barker v. Keate, 2 Mod. 252.
(*o*) Co. Litt. 279.

granted by way of release. (*p*) The reason given against an assurance by lease at the common law, and release before the entry of the lessee, would apply with equal and still greater *reason* as an authority for this point. The objections, (*q*) it may be remembered, were,

First, that there was merely an *interesse termini* and not an actual term, or estate, and the objection is applied with still greater force when there is no interest whatever, by way of *interesse termini* or otherwise. The other objection was, that there was no reversion divided from the possession, and as a consequence, there was not only the want of an interest capable of enlargement, but there was also a deficiency of that species of interest, which was the subject of a grant, capable of being passed by deed, without livery, inrolment, &c. (*r*) Hence this assurance is constituted of two acts, the one perfectly distinct from the other, though both are taken into consideration by the law as parts of the same assurance. (*s*) The lease for a year is usually contained in a deed, either poll or indented. A deed however is not essentially necessary, but it is essential to the validity of the release; for the lease creates a

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(*p*) Co. Lit. 3381.
(*q*) Co. Litt. 270. a.
(*r*) Co. Litt. 49. a. Shep. T. 227.
(*s*) Barker v. Keate, 2 Mod. 252.

particular estate, and the remaining interest of the grantor is a *reversion*, and this reversion cannot be transferred without a grant; and a grant cannot be made without a deed.(*t*)

In point of law, therefore, and generally in point of fact, an assurance by lease and release consists of two distinct acts contained in two distinct instruments,

1st, Of a lease for a year, in one instrument, dated on one day, and,

2dly, Of a release of the freehold or inheritance, in another instrument, dated on the next succeeding day.

It has been said that both these instruments may be contained in the same deed, and written on the same parchment. Certain it is, that the two instruments may be dated on the same day, (*u*) and may be, and generally are, executed in the same instant of time. In correct practice the execution of the lease for a year ought to precede the execution of the release; but even though it should be proved that the lease and release were executed in a different order, the release, being executed in the first instance, and the lease for a year afterwards, the law, in applying the rule which makes these two instruments parts of the same assurance, would reject this evidence of priority, and consider the

(*t*) Shep. T. 227.
(*u*) Lord Raymond, 276.

legal operation of the two instruments to be, 1st, a lease, and 2dly, a release. There are general principles with which such a decision may be easily reconciled, but till the precise point shall have been decided, a title depending on a lease and release executed in this mode, would by cautious practitioners, be treated as doubtful. It is certain that in the absence of evidence of the fact, the law would presume the priority in the execution of the lease, as the means of giving effect to the release.(v)

These observations apply to the assurance only when made by a lease and release as parts of the same transaction; and when the particular estate is created solely for the purpose of being the foundation of the release; and also when the lease is by bargain and sale; for when the lease is at the common law, and of lands held for an estate in possession, there must be an entry by force of the lease, in the interval between the execution of the lease, and the execution of the release.

In investigating titles, it will sometimes occur that there is a release only without a lease for a year, as part of the same transaction; and the object of the release is to enlarge an estate previously existing and created independently of any intention to make the release. Cases of this sort depend on those rules of law, from which the

(v) 1 Burr. 106.

assurance by lease and release, as parts of the same transaction, originated, and of course they are to be considered, with reference to the rules of law which govern the doctrine of releases made in enlargement of estates, as that doctrine stood prior to the introduction of the assurance by lease and release, as a substitute for a feoffment. In other instances, the lease for a year may be lost, or may be defective in not having proper parties, or from an omission or error in the parcels. In instances of this sort also, it is frequently necessary to recur to the common law learning; and the releases are for the most part, found to be available, (*w*) either as grants of the reversion, or remainder expectant upon some attendant term, or estate for life, or term in an ordinary lessee or occupier, being at least a tenant at will or copyholder, or as capable of operating as a release, in enlargement of some estate, which at the time of the execution of the release, was vested in the releasee. On this account it will be proper, in considering who may be a releasor, and who may be a releasee, to take a general view of the law as it applies to releases in enlargement of estate, independantly of the more prevailing practice of making a lease for a year, as the

(*w*) Roe v. Tranmer, 2 Wilson, 682.

foundation of the release. With the exception also of those instances in which the lease for a year is perfected by entry, the student should always bear in mind that the lease for a year *is, in strictness, a bargain and sale*, giving a vested estate, through the medium of the statute which executes the use into possession; that is, into estate, and as often as passages are brought before his notice, which either express or seem to imply, that the lessee has or must have the possession, he must understand these passages, as meaning nothing more, than that the lessee has or must have an actual and vested estate; that it is immaterial whether this vested estate confers a right to the immediate possession, or to the possession, only after the determination of some prior estate. It follows that it is indifferent whether the lease for a year is made by a person seised of lands held for an estate in possession, or of lands held for an estate in reversion or remainder. At the same time, care must be taken to avoid a mistake, into which these observations might easily lead a student. Although a bargain and sale for years passes an use, and that use may be executed *instanter* in to estate by the statute;(x) and such estate is a sufficient foundation for a release, this

(x) Heyward's Case, 2 Co. 35.

must be understood of a bargain and sale, containing a limitation, which, from its nature and form, does give a vested interest: for when the use depends upon a contingency, or is to commence from a future day, the bargain and sale will not confer a vested interest, until the contingency has arisen, or that day is arrived. In the mean time there is not any *estate*, and of consequence the bargainee is not capable of a release, to operate under the rule which has been considered. The release, in this instance, as at the common law, may operate by way of discharge, to extinguish a rent; but cannot have the effect of enlarging that which in point of law, or in fact, does not exist, (*x*) or granting the inheritance as a reversion, by means of the bargain and sale, since there is not any division of the possession from the inheritance. This observation will suggest the caution of making the estate limited by the bargain and sale, a vested interest; and on this point the necessary observations will be added in treating of the form of the lease.

3dly, and 4thly. *Who may be the Releasor, and who may be the Releasee.*

1st. In respect of personal qualifications.
2ndly. In respect of estate.

1st. Whoever may be a grantor, and seised

(*x*) Co. Litt. 270. a.

to an use, may be a bargainor, as the means of being a releasor, in the release; and whoever may be grantee, and is capable of an use, may be a bargainee, as the means of being a releasee in the release; and whoever may be a bargainor or bargainee of the use, may be a releasor or releasee.

The terms of qualification, respecting the use, are added, to adapt the proposition to the circumstances, that the lease and release are, in their modern use, parts of the same assurance, and that the lease is to operate as a bargain and sale, through the medium of the statute, for transferring uses into possession. (y)

Some persons are incapacitated to grant, as,
Infants, for want of discretion,
Married women for want of free will,
Lunatics,
Idiots, and
Persons deaf, dumb, and blind;

because these persons are deprived of all means of communication; but all these persons may be grantees; and when they are grantees, an use (z) declared of their seisin will be executed by the statute.

The King may grant, but he cannot stand seised to an use.(a) So a corporation may

(y) 27 Hen. VIII.
(z) Bacon on Uses, 57.
(a) Bacon on Uses, 66.

grant, but it is to be found in books of the most approved authority, that a corporation cannot stand seised to an use.(*b*)

An alien may grant, and such grant will be good as against himself: but void against the King, on office found; but neither an attainted person, (*c*) or an alien (*d*) can *take a conveyance* to an use, which will be binding against the crown or the lord of the fee.(*e*) But an alien (*f*) or attainted person is capable of an use. It is sometimes supposed that neither an attainted person, or an alien, can stand seised to an use. (*g*) This, if applied to the right to charge the seisin, with an use, does not seem quite correct. The use cannot be executed, as against the King or the lord: but it is no where to be found, that an use bargained and sold by an attainted person, or an alien, will not arise, and be executed by the statute: and granting that an attainted person or an alien may bargain and sell an use, he may convey by lease and release.

That the crown or the lord may defeat such alienation, is a point of very different consideration. The right of avoiding the

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(*b*) Broke Abr. Uses, pl. 10. Bacon on Uses, 57.
(*c*) Pimb's case, Mo. 196. 1 Inst. 13 a. note 7.
(*d*) King v. Boys, Dyer, 273. b. 1 Inst. 2. a.
(*e*) Dyer, 283. Poph. 72.
(*f*) Godb. 275.
(*g*) Gilbert on Uses, 5, 170.

conveyance, depends on the right of alienation, as governed by common law principles, and not on the ability of aliens, &c. to bind themselves by a bargain and sale of the use.

The cases of infants, married women, lunatics, idiots, persons, deaf, dumb and blind, depend on common law principles, without any circumstance peculiar to the lease and release, as parts of one and the same assurance. There is an incapacity to alien; an incapacity created by the law for their sakes, and to protect them from undue advantages; and they are equally, or rather more, incapable to make the release, than they are to make the bargain and sale. With a view then to the mode of operation of the lease and release, nothing, material to the illustration of the principles which govern the learning respecting this assurance, arises out of the relative situation of these persons: and all these persons may receive the seisin under a conveyance to them: and uses declared of their seisin will be executed by the statute of 27 Hen. VIII.

It may, however, be useful to observe, that prior to the case of *Zouch* v. *Parsons*, (*h*) a lease and release by an infant, had been treated by the profession, and by the best text writers, as absolutely void. Lord *Mansfield* and the court of King's Bench, decided

(*h*) 3 Burr. 1794.

that a conveyance by an infant by lease and release, was, under the circumstances, which occurred in that case, voidable only and not void. But no lawyer of eminence has thought it safe to follow that decision in practice: and that excellent property lawyer, the present chancellor(*i*), has repeatedly approved the observations of counsel, when questioning the authority of this case. To admit, indeed, that such a decision is law, is to confound all distinctions; and to oppose all authority on this head. The law had admitted that an infant could make a lease reserving rent; thus a lease reserving rent was voidable, (*k*) while a lease without any reservation of rent was absolutely void.(*l*) The law also admitted that the feoffment or other gift of an infant by means of livery of seisin, was voidable only, and not void, when made by an infant *in person*,(*m*) while it declared a livery of seisin made by the infant by means *of an attorney*, to be absolutely void.(*n*)

These distinctions between livery in person, and livery by attorney, assumed that the infant could not appoint an attorney;

(*i*) Lord Eldon.

(*k*) Shep. Touch. 267. Moor, 105.

(*l*) Plowd. 545. Shep. Touch. 267. Moor. 105. Except a lease to try a title by ejectment. The distinction between leases with and without rent has been doubted: but quære if with sufficient attention to the authorities.

(*m*) Bro. Abr. Coverture, pl. 40. Ib. Infancy, pl. 1.

(*n*) Wittingham's Case, 8 Rep. 45. a. 9 H. 6. 6. Perk. § 12, 13, 14. 2 Roll. Abr. 2.

and consequently could not, through the medium of an attorney, give livery of seisin. An infant, it is to be observed, is always sued by guardian and not by attorney.

Many books of authority ascribe the defect of a feoffment by attorney, to the inability of the infant to make a deed. But in some instances an infant may make a binding deed: as in the case of a single bill or bond for necessaries; and leases by an infant may be good, although a deed is essential to the validity of the lease.

Though the case of *Zouch* and *Parsons* has not been expressly over-ruled, the probability is, that whenever the point shall require an express and explicit decision, it will be determined that a conveyance by lease and release, made by an infant, cannot, under any circumstances of interest or no interest in the infant, or benefit or no benefit to him, be supported.

It remains to be added that according to *Bacon on Uses*, (*o*) an infant may in consideration of maintenance, &c., bargain and sell an use; in other words, may stand seised to an use: but the better opinion is that an infant cannot raise an use by his bargain and sale; (*p*) *Bacon* also admits, p. 67. that an

(*o*) p. 67.
(*p*) 2 Inst. 673.

infant cannot raise an use by covenant to stand seised, in consideration of blood or marriage. The obvious objection against the efficacy of this assurance is that the infant cannot covenant: for a covenant cannot be created without deed; and an infant cannot make a deed.

The same observations which apply to a king, equally apply to a queen regent and even to a queen consort.(q) The king cannot stand seised to an use, even though the conveyance is to the king as an individual, and only for his life.(r) It follows that he cannot make a bargain and sale for years or in fee, to operate through the medium of the statute of uses, and this impediment is extended to property he has in his individual capacity, as well as property of which he is seised, *jure coronæ*.(s) All the books agree on this point. Before the statute of uses, the law was, as at this day, that the king could not be a trustee. A trust cannot be decreed against him. This arises from his prerogative. No suit to enforce a right can be maintained against the crown.(t) As the king could not be compelled to perform a trust, the law has considered him as

(q) Bac. on Uses, 56.
(r) Bac. on Uses, 56.
(s) Bac. on Uses, 57. Broke. Feoffm. to Uses, pl. 31.
(t) Year Book, 7 Ed. 4. 17.

discharged from the trust: (*u*) and the statute of uses executed those trusts only for which there was a remedy at the time of passing the statute. That it is from the prerogative, of being exempt from suit, that the king cannot be seised to an use, or cannot be a trustee, may be collected from the admission, that if an individual who was chargeable with a trust, became king, he was immediately discharged from the trust. This would have happened in the person of Richard the Third,(*v*) if an act of Parliament (*w*) had not been passed to prevent so manifest an injury. The doctrine of exemption from the trust, has been carried to the extent that the *alienee of the crown* (*x*) was not liable to perform the trust: so that the exemption of the crown from the trust was a discharge of the lands themselves from the trust.

The case of the *queen consort*, turns on the prerogative of her husband; in regard to the government and interest the king hath in her possessions.(*y*)

(*u*) Week's Case, 2 R. A. 780.
(*v*) Bac. on Uses, 57.
(*w*) 1 R. 3. c. 5.
(*x*) Bac. on Uses, 57.
(*y*) Bac. on Uses, 57.

As to corporations, the language of the ancient as well as the modern books is, that a corporation cannot be seised to an use.(z) Hence the objection, in practice, that a corporation, cannot convey by a lease for a year, operating as a bargain and sale, and a release. This objection equally applies to sole corporations; and to corporations aggregate of many.(a) But in regard to sole corporations, as a bishop, there is this diversity: a conveyance to a sole corporation *to uses*, will be good, for the benefit of the corporation; and the estate will not be subject to the use which is declared.

But a bargain and sale by *a sole* corporation will be good, during the office of the person by whom the bargain and sale is made.(b) Thus the law admits the individual to be *bound*, as far as he has individually an ownership.

The language of *Bacon* is,(c) "If a bishop "bargain or sell land whereof he is seised, in "right of his see, this is good during his "life, it should be during his incumbency, "otherwise it is where a bishop is enfeoffed "to him and his successors, to the use of

(z) Bac. on Uses, 57.
(a) Bac. on Uses, 57.
(b) Bac. on Uses, 57.
(c) p. 57.

"J. D. and his heirs, this is not good; no, "not for the bishop's life: but the use is "merely void."

From this distinction, if allowed to prevail, it will follow that a lease and release by a sole corporation, is an efficient conveyance; while a like conveyance by a corporation aggregate, is open to the objection, that the lease, or bargain and sale for a year, is inoperative, and cannot be a foundation for a release.

The alledged reason for which a corporation cannot stand seised to an use, is "because their capacity is to an use certain;"(d) again, "because they cannot execute an "estate without doing wrong to their corporation or founder,"(e) and finally because the court of Chancery could issue no process against them for the execution of the use.(f)

Hence the practice, for corporations aggregate to convey by feoffment, or by a lease at the common law, to be perfected by entry prior to the release; and then by a release made in enlargement of the estate granted by the lease.(g) In one case it was admitted, that a corporation might *give an*

(d) Bac. on Uses, 57.
(e) Bac. on Uses, 57.
(f) Cruise on Uses, 22. Gilb. on Uses, 5. Plow. 102.
(g) Holland v. Bonis. 2 Leo. 121. 3 Leo. 175.

use, although it *could not stand seised to an use*: and it was supposed that a bargain and sale in fee, by a corporation was sustainable as a valid assurance.

In the distinction, that a corporation may give an use, and that it cannot stand seised to an use, there is a refinement not fit to be followed in judicial decisions. There is a difference in terms only, and not in substance, or in sense. If a corporation can, give an use, it must be on the ground, that it can stand seised to an use: and if a corporation can give the use of the fee, it can, with equal reason, give the use for a term of years: and, the use being given, the statute will execute it into estate, and the estate thus created, may be enlarged.

The case which admits the bargain and sale in fee to be efficient, has not been followed in practice: and it cannot be supported in principle, consistently with the doctrine, that a corporation cannot stand seised to an use. Either the rule that a corporation may give an use, or the more ancient and more approved rule, that a corporation cannot stand seised to an use, must be abandoned, whenever the question shall be brought forward, for judicial decision; unless the rule *stare decisis* shall be allowed to prevail, and establish one of those anomalies which disgrace the law as a science: although it must be admitted that

every decision, right or wrong, ought to be followed, if it has once become an acknowledged rule of property. The more ancient rule, that a corporation cannot stand seised to an use, seems too well established to give place to the more modern decision, that a corporation may give an use: and that decision has never been followed in practice, so as to become an acknowledged rule of property. Perhaps it may be safe to say, that there are not three titles in the kingdom depending on the question whether a corporation can give an use; that is, make a bargain and sale in fee, under the statute of uses; although they cannot stand seised to an use, so as to convey by a bargain and sale for a year, and a release grounded on the estate of the bargainee.

From the rule that a corporation cannot stand seised to an use, it would be a fair and reasonable inference that a corporation could not be a *trustee*, and that a specific performance of a contract could not be decreed against them. This inference, however just in its analogy, would not be warranted by the acknowledged doctrine of modern times. Corporations frequently are trustees for charitable and other purposes; and no one is at liberty to doubt, that these trusts are binding on the corporation; and contracts for sale are binding on corporations as well as on individuals. In these particulars, also,

there is an inconsistency, which destroys the uniformity of the law, and renders its study so abstruse. Granting it to be true, that a corporation cannot give an use, or cannot be seised to an use; it ought to follow as a deduction from the same principles, that it cannot be a trustee or make any contract which a court of equity can enforce. If a corporation could not have been a trustee before the statute of uses, no alteration in the law on this head, has been made since the statute; and to be consistent it ought to have been decided that a corporation cannot be a trustee in modern times. But if it be admitted that corporations might before the statute, have been charged with trusts; then the statute of uses might reconcile the distinction, by allowing the conclusion, that the statute for transferring uses into possession, applies to the seisin of "persons," and not to the seisin of corporations; thus leaving the uses or trusts, declared of the seisin of corporations, in the same state in which they were sound. The learned Bacon in his examination of the statute of uses, and the decisions grounded on the same (*h*); and in comparing the law since the statute of uses, with the rules of equity and of law, founded on several statutes prior

(*h*) Bac. on Uses, 57.

to the statute of uses; adverts to this difficulty. After stating the reasons against a corporation being seised to an use; he adds, "but chiefly because the letter of this statute, which in any clause when it speaketh "of the feoffee resteth only upon the word "person, when it speaketh of *cestui que use*, "(*i*) it addeth person or body politic." In this place, however, let it be remarked that the same objection equally applies to the execution of an use, as against a corporation sole; for example a bishop; and if that point is not expressly decided, (and no decision has occurred) it may require further consideration.

It remains to be observed under this head, that uses may be declared on a *conveyance by a* corporation, which passes the seisin from them to a person, capable of standing seised to an use.

It rarely happens that a corporation is advised to convey by lease, even at the common law, and a release in enlargement. But this is sometimes done: and then the lease is taken in the name of some one, who may actually enter; and after the lessee has entered, the release is executed. On the lease or on the release, a memorandum of the entry should be made; and the release should recite the fact of entry. This recital will be

(*i*) Bac. on Uses, 57.

given, in shewing the forms of the lease and release.

An attainted person has the capacity of being a grantee (*k*), but the grant will enure for the benefit of the king (*l*). So an alien may be a grantee, but the benefit of the grant will belong to the king by his prerogative.(*m*)

On these points the following passages are to be found in Bacon's valuable Reading on Uses. "If an attainted person be enfeoffed to an use; the king's title after office found shall prevent the use, and relate above it, but until office, the *cestui que use* is seised of the land."

"Like law of an alien, for if land be given to an alien, to an use, the use is not void *ab initio*; yet neither alien or attainted person can maintain an action to defend the land."

In these points the common law was closely followed. The law distinguishes between the legal seisin, and the use derived out of that seisin; giving to the crown the common law benefit of even a momentary seisin; allowing the use to be good, as against the attainted person, and as against the alien: but the crown, is at

(*k*) Perk. § 48.
(*l*) Co. Litt. 2. b.
(*m*) Co. Litt. 2. b.

liberty to interpose and claim the lands by reason of the seisin, which was in the attainted person, and the alien respectively. Their claim when established is paramount to the use: it is founded on prerogative; (*n*) and the title by prerogative supersedes that of the use; and intercepts its operation. Respecting attainted persons, it is to be observed, that the person who is attainted though *civiliter mortuus*, is capable of being a grantor or grantee even after attainder (*o*). After the crime committed, and before attainder he may alien, even as against the lord, claiming by escheat: though he cannot after the crime committed, alien as against the lord claiming the benefit of forfeiture, viz. the year, duty, and waste.

The case of an attainted person must then be understood, as depending on a grant made *to a person* after he was attainted, and when he was incapable to convey. But on this point of title there is, it should seem, a difference between attainder for felony, and for treason. The title under attainder for treason is by reason of *forfeiture*; and the relation of title is to the time of the crime committed. In cases of attainder for felony,

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(*n*) Co. Litt. 2. b.
(*o*) Peck. 8, 25, 48. Shep. T. 200, 231, 205. Co. Litt. 2. 6.

the only forfeiture is of the rents and profits for the life of the criminal, and the year day and waste from his death. Should there be an escheat it must be *pro defecto sanguinis*, (viz. want of inheritable blood), *propter delictum tenentis*, (by reason of the crime of the tenant). In the case of treason, the alienation between the crime and attainder will not, and in the case of felony, it will avail. But it seems no alienation after attainder, even for felony, will be valid against the lord (*p*). After attainder of a tenant in tail, he may by fine or common recovery (*q*), bar the intail, and by common recovery, bar the remainders and reversion expectant on the intail (*r*); at least this is the better opinion (*s*); and this opinion is quite consistent with the point, "that a man attainted of felony or murder, &c. may make "a grant of rent or common, or a feoffment, "&c. and the same shall bind all persons but "the king for his time, and the lord of whom "the land is held, when his time shall "come (*t*)."

It may not be without its use to observe that though a woman may not sue her hus-

(*p*) Co. Litt. 2. b.
(*q*) Shep. T. 6.
(*r*) Stevens v. Winning, widow, and others. 2 Wils. 219.
(*s*) Contra, Barton Call. 2 Roll. Abr. Jenk. cent.
(*t*) Perk S. 26.

band, a husband may stand seised to the use of his wife: and even an use may arise from his seisin, although such use, as in the case of a term for years, will immediately after its existence, be in his power (*u*). The general conclusion is, that all persons who are in the *per*; that is, derive their title by the conveyance of the former owner; may stand seised to an use; while those who are in the *post*; that is, come in under the paramount title, as the lord by escheat; are not bound by uses (*v*).

So disseisors and other wrong doers, who assert a title independent of that of which uses are declared, are not bound by the uses declared of the seisin they avoid. But this doctrine, though proper to be understood for illustration, is less relevant in modern times, than it was at or about the time when the statute of uses was enacted. The instantaneous operation of the statute, by converting the use into an estate, excludes the greater part of these questions; leaving all the other cases, except those of the king, corporation, attainted persons and aliens, a dead letter; at least as far as they are applicable to the points now under consideration. The cases of the king, and of corporations, are still important, as they are a barrier through the medium of a technical

(*u*) Bac. on Uses, 59.
(*v*) Jenk. Cent. 193. pl. 92. 1 Rep. 122. arguendo.

objection, against raising an use from the seisin of the king or corporation, so as to give an estate, admitting of enlargement. That the doctrine may not be carried further than it ought to be, it will be proper to add, that an attainted person or alien, and also a corporation may be a *cestui que use*; consequently they may receive an use, though they are as to the corporation altogether; and as to the attainted person, and alien *sub modo*; disqualified, or incapacitated from standing seised to an use, on a *conveyance* to them. From these deductions, it is easy to arrive at the conclusion; a conclusion well warranted by law; that a conveyance to a corporation, or an attainted person, or an alien by lease and release, is free from objection. In these instances, the use arises from the seisin of the grantor; and he may be seised to an use, and the corporation, the attainted person, or the alien is capable of the use. But if uses should be declared of the estate passed to them by the release, then the objection will recur, that though the release is good, and well warranted and supported by the lease; the uses declared on the release are open to the objection, that the corporation, or as against the lord or the crown, the attainted person or the alien, cannot be seised to an use.

2ndly, In respect of estate.

That a man may be seised to an use, he must have or take an estate of freehold (*w*). That estate alone gives a *seisin*; it follows that tenant for life, or tenant in fee may make a bargain and sale for years, or for any estate co-extensive with or less than the estate of the grantor. By seisin is to be understood, not only the interest, but also the state of the title. A man who is disseised, or whose estate is discontinued has not any seisin; it follows that he cannot stand seised to an use. He must restore his seisin by entry or claim, before he can acquire the ability of conveying by lease and release (*x*).

In the old books it is supposed that tenant in tail cannot stand seised to an use. In every day's experience it occurs, that tenants in tail convey by lease, being a bargain and sale for a year, and release; or by bargain and sale alone to another and his heirs (*y*); and no doubt is entertained of the validity of either species of assurance, as good against him, and voidable only, and not void as against his issue. Even his covenant to stand seised to an use, will operate except

(*w*) Jenk. Cent. 195. pl. 1.
(*x*) Gilb. Uses, 205. Jenk. 5 Cent. c. 1. 3 Bulstr. 134.
(*y*) Seymour's case, 10 Rep. 95.

under particular circumstances. The excepted case is a covenant by tenant in tail to stand seised to uses, to commence in *terms*, after his death (*z*). As such uses interfere with the better title of the issue, the use will not arise, at least as against them. Should the tenant in tail alien, and bind his issue, it is a question for consideration, whether the use may not arise. The objection will be *quod ab initio, non valet, tractu temporis non convalebit.* The elaborate judgment of Lord Chief Justice *Holt* in Mathell *v.* Clark (*a*), contains the leading and more material points, respecting alienations by tenant in tail.

The doctrine that tenant in tail could not stand seised to an use, raised the question whether he could receive a conveyance, of which uses could be declared. After much discussion on this point, the result is that no use will be implied in a conveyance to a man, as tenant in tail. As he takes a particular estate and for a special purpose, the law will imply the use in his favor, and no use will result. But when a conveyance is made to a person as tenant in tail, upon an use which is expressed, the statute will

(*z*) Lord Raym. 781.
(*a*) Lord Raym. 781.
(*b*) Cooper v. Franklin, Cro. J. 400.

execute this use into estate (*c*). These latter points, it will occur, are material to the consideration of the operation, and effect of the release; and not of the mode in which the lease and release, as parts of the same assurance, derive their efficacy. They concern the uses declared on the release, and have not any application to the lease for a year, as the foundation for the release. It may also be called to recollection from the passages in a former volume, that tenant in tail who levies a fine, or suffers a recovery without declaring any use, will have a fee, and not his old intail, by *resulting use.*

In the further consideration and investigation of the points, under this and the former division; let the reader carefully distinguish between those cases in which the question is whether the seisin, which a person already has, can be subjected to an use, while the estate remains with him, and whether he can receive a conveyance to uses, or can make a conveyance to uses.

There are three classes of cases; under the first, we may rank those of

The king.
Queen regent.
Queen consort.
Corporation.

(*c*) Godbolt 269. Bac. on Uses, 57.

And no use can be given them, so as to charge *their seisin* with an use, and consequently they cannot convey by a bargain and sale for a year, and a release grounded on the same. On this point, there was some distinction respecting villeins, &c. which is no longer material.

2ndly, They and various other persons, as tenants in tail may take a conveyance to uses, which will be executed by the statute as against them, but as against other persons having paramount titles affecting the seisin, as in the case of attainder, alienage, issue in tail, &c. the conveyance will be good; and the uses will, as against the lord, &c. be void.

3dly, All these persons, and all other persons who are competent to convey, either absolutely or as against themselves, &c. can make a conveyance to uses; and the uses will be good, till the conveyance shall be avoided.

The two last points embrace considerations peculiar to the uses declared by the release, independent of the effect of the lease and release, as parts *of the same assurance*.

To understand with precision, the learning applicable to this sub-division, it will be proper to take a comprehensive view of the general doctrine of the common law, respecting releases in enlargement of an estate.

It is on this doctrine that the assurance

by lease and release, as used in modern practice, is fundamentally grounded.

In reference to this object it shall also be considered, who may be the releasor in respect of estate, and who may be the releasee in respect of estate.

1st, Who may be the releasor.

As it may be collected from a former observation, it is essential that the releasor should have a *vested interest* (*d*), in his own right, or in right of his wife (*e*).

It will not be sufficient that he has a *contingent remainder* (*f*); an interest by *executory devise* (*g*), or a mere *possibility*, hope, or chance of succession; as is the case of an *heir apparent*, or heir *presumptive* (*h*). Persons thus circumstanced, may create estoppels (*i*), but they cannot make grants available to *transfer* their interests (*k*): and a release is, in its mode of operation, a grant by way of transfer, and not merely of discharge, as a release by way of *metter le estate* or *metter le droit* (*l*). Also a person who has merely a right of entry, or of action as a disseisee, or person whose estate is dis-

(*d*) Litt. § 458. Shep. Touch 331.
(*e*) Co. Litt. 273. b. Shep. T. 324.
(*f*) 1 Fearne 537. Co. Litt. 214. a. Shep. T. 238, 325.
(*g*) 2 Fearne Shep. T. 238. Lampet's case, 10 Rep. 8. b.
(*h*) Hob. 45. Litt. S. 446. Co. Litt. 265. a.
(*i*) Weale v. Lower, Pollex 54., Perk. § 80.
(*k*) Co. Litt. 214. a
(*l*) Co. Litt. 273. b.

continued, has no estate to be enlarged (*m*). He may release to the disseisor by way of extinguishment of right, but the disseisor cannot release to him with effect. A release would however, in all probability, amount to a renunciation of the disseisin and do away its effect.

By modern decisions, it is established that possibilities coupled with an interest, are devisable (*n*). It is also settled that they may be released, by way of extinguishment of right (*o*), or may be bound by way of estoppel (*p*).

In equity, owners under contingent remainders, and executory devises, may bind themselves by *contract* for a valuable consideration. In this sense, and to this extent, these interests are transferrable. But because they are transferrable in equity, it by no means follows that they are grantable at law: on the contrary the decisions in equity suppose and admit, that the conveyance has not any *legal* operation. When it is said in some recent decisions that these interests are assignable (*q*); that expression, must, it is submitted, be un-

(*m*) Shep. T. 319. 322.
(*n*) Roe v. Jones, 3 Term Rep. 88. 1 Hen. Blacket. 30.
(*o*) Co. Litt. 214. Shep. T. 238.
(*p*) Weate v. Lower, Pollex. 54. Buckler's case, 2 Rep. 55, Moore's Case, Palmer, 365.
(*q*) Roe v. Jones, 3 Term Rep. 88.

derstood with the restrictions and qualifications expressed in this work. This remark is more necessary, because some gentlemen of the highest eminence have advanced the doctrine, that possibilities coupled with an interest are grantable; these persons considering by some unaccountable mistake, that whatever is devisable, is grantable. The rule is only that whatever is grantable is devisable.

As connected with this subject, it may be observed that contingent interests to the *survivor* of several persons (*r*); or to persons who shall answer a given description, and who are not yet ascertained, as the children of A. *who shall be living at his death*, or the expectancy of an heir, though they are possibilities coupled with an interest, are not, it is apprehended, devisable, or even releasable: and in a late case(*s*) of great anxiety, and very fully considered, it was decided in the court of King's Bench, that a right or title of entry, or of action, though an interest which is releasable, is not devisable.

On this judgment there was a writ of error brought in the exchequer chamber, and this point was fully argued and dis-

(*r*) 1 Fearne, 541.
(*s*) Goodright v. Forrester, 8 East, 559.

cussed; but the decision of that court was founded on another point, the bar by non-claim on a fine with proclamations: The Ch. Justice of the Common Pleas who delivered the judgment of the Court of Exchequer chamber, distinctly and repeatedly declared, that there was not any intention in that court of questioning the judgment in the King's Bench. (*t*)

That expectancies may be bound by estoppel, is the consequence of a rule of law, concerning titles, and not of any present interest, in the parties. Equity holds the contract of an expectant heir who becomes heir *de facto*, binding on him: but this equity is deemed personal to the party and does not extend to his heir.(*u*)

It is immaterial whether the releasor has *an estate* in *possession*,(*v*) *reversion*, or *remainder*;(*w*) or whether he is a *joint tenant*, or *tenant in common*, or a *coparcener*, or even seised by *entireties*. The release may operate under all these circumstances. It may also operate whether it proceeds from a person seised of an estate in *fee simple*, *fee tail*, or *for life*. All that is requisite is, that there should be in the releasor, an estate of

(*t*) This is stated from the author's knowledge of the fact.
(*u*) Clayton v. Duke of Newcastle, 2 Ch. Ca. 112. Morse Faulkener and others. Anstr. 11.
(*v*) Co. Litt. 265. a.
(*w*) Shep. T. 321.

freehold or *inheritance*. The statute of uses (*x*) applies to estates of those persons alone, who are *seised*; and it follows that the bargain and sale, as part of the assurance by lease and release, must proceed from a person who has an estate of inheritance, or at least an estate in freehold. The use declared of the estate of a *termor* for years, or of the estate of the owner of any other chattel interest, cannot be executed into estate by the statute.

The releasor must also be a person, who in point of estate, may stand seised to an use. Instances have already been enumerated of the king, a corporation, &c. in which the use cannot arise by reason of some circumstances peculiar to the grantor; and it has already been noticed that a tenant *in tail* may, under certain modifications, stand seised to an use. The observations on that point prove that a lease and release by a tenant in tail, will be an efficient conveyance to pass his estate (*y*). Such conveyance, however, will be defeazible, by the issue in tail, the remainder-men or reversioner, unless the proper ceremonies for barring the interest of these persons shall be observed.

2ndly, Who may be the releasee. Any

(*x*) 27 H. 8. c.

(*y*) Seymour's Case, 10 Rep. Machel v. Clerk, 2 Lord Raym. Doe Whitehead, 2 Burr. Stapylton v. Stapylton, 1 Atk. 2.

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